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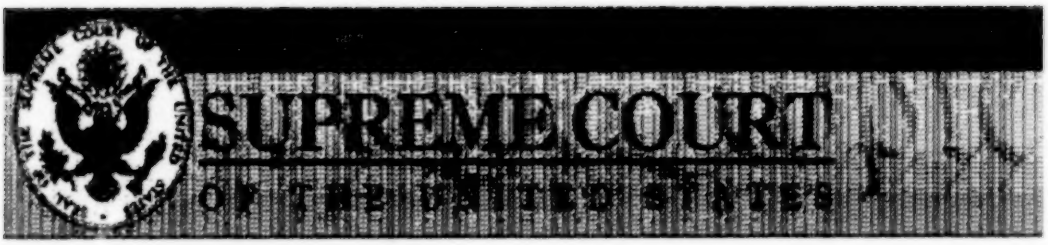

No. 13-7211	*** CAPITAL CASE ***
Title:	Robert Mitchell Jennings, Petitioner v. William Stephens, Director, Texas Department of Criminal Justice, Correctional Institutions Division
Docketed:	November 4, 2013
Lower Ct:	United States Court of Appeals for the Fifth Circuit
Case Nos.:	(12-70018)
Decision Date:	July 22, 2013
Rehearing Denied:	August 15, 2013

Questions Presented

~~Date~~	~~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~
Oct 28 2013	Petition for a writ of certiorari and motion for leave to proceed in forma pauperis filed. (Response due December 4, 2013)
Dec 5 2013	Order extending time to file response to petition to and including January 3, 2014.
Dec 26 2013	Order further extending time to file response to petition to and including February 3, 2014.
Feb 3 2014	Brief of respondent William Stephens, Director, Texas Department of Criminal Justice, Correctional Institutions Division in opposition filed.
Feb 20 2014	DISTRIBUTED for Conference of March 7, 2014.
Mar 10 2014	DISTRIBUTED for Conference of March 21, 2014.
Mar 24 2014	Motion to proceed in forma pauperis GRANTED. Petition for a writ of certiorari GRANTED limited to Question 4 presented by the petition.
Apr 1 2014	Motion to appoint counsel filed by petitioner Robert Mitchell Jennings.
Apr 14 2014	The time to file the joint appendix and petitioner's brief on the merits is extended to and including June 10, 2014.
Apr 14 2014	The time to file respondent's brief on the merits is extended to and including August 12, 2014.
Apr 16 2014	Motion DISTRIBUTED for Conference of May 2, 2014.
May 5 2014	Motion to appoint counsel filed by petitioner GRANTED. Randolph L. Schaffer, Jr., Esquire, of Houston, Texas is appointed to serve as counsel for the petitioner in this case
Jun 6 2014	Joint appendix filed. (Statement of costs filed)
Jun 6 2014	Brief of petitioner Robert Mitchell Jennings filed.
Jun 17 2014	Brief amicus curiae of Criminal Justice Legal Foundation in support of neither party filed.
Jul 9 2014	Record requested from U.S.C.A. 5th Circuit.

Jul 18 2014	SET FOR ARGUMENT ON Wednesday, October 15, 2014
Jul 22 2014	Record received from U.S.C.A. 5th Circuit is electronic and located on PACER.
Jul 29 2014	Record received from U.S.D.C. Southern District of Texas Houston Division. (2 -Box)
Aug 12 2014	Brief of respondent William Stephens, Director, Texas Department of Criminal Justice, Correctional Institutions Division filed. Aug 14 2014 CIRCULATED.
Sep 11 2014	Reply of petitioner Robert Mitchell Jennings filed. (Distributed)
Oct 15 2014	Argued. For petitioner: Randolph L. Schaffer, Jr., Houston, Tex. For respondent: Andrew S. Oldham, Deputy Solicitor General, Austin, Tex.
Jan 14 2015	Judgment REVERSED and case REMANDED. Scalia, J., delivered the opinion of the Court, in which Roberts, C. J., and Ginsburg, Breyer, Sotomayor, and Kagan, JJ., joined. Thomas, J., filed a dissenting opinion, in which Kennedy and Alito, JJ., joined.

PETITION FOR WRIT OF CERTIORARI

No. 13-7211

In The
Supreme Court of the United States

ROBERT MITCHELL JENNINGS,
Petitioner,

v.

WILLIAM STEPHENS, DIRECTOR,
TEXAS DEPARTMENT OF CRIMINAL JUSTICE,
CORRECTIONAL INSTITUTIONS DIVISION,
Respondent.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

RANDOLPH L. SCHAFFER, JR.
Counsel of Record
1301 McKinney, Suite 3100
Houston, Texas 77010
(713) 951-9555

Counsel for Petitioner
Robert Mitchell Jennings

QUESTIONS PRESENTED

1. Did the Fifth Circuit err in reversing the district court's grant of habeas corpus relief based on ineffective assistance of counsel at the punishment stage of a death penalty trial by deferring to a state court prejudice determination that was contrary to or involved an unreasonable application of clearly established Supreme Court precedent?

2. Did the Fifth Circuit err in holding that the state court reasonably determined that trial counsel made a sound strategic decision not to present any evidence of petitioner's disadvantaged background in a capital case where, in its absence, the jury was deprived of meaningful mitigating evidence that could have resulted in a life sentence?

3. Did the Fifth Circuit err in holding that the federal doctrine of waiver precludes a federal habeas court from considering an argument made initially in a footnote in a state court brief that was not waived under state law?

4. Did the Fifth Circuit err in holding that a federal habeas petitioner who prevailed in the district court on an ineffective assistance of counsel claim must file a separate notice of appeal and motion for a certificate of appealability to raise an allegation of deficient performance that the district court rejected even though the Fifth Circuit acquired jurisdiction over the entire claim as a result of the respondent's appeal?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

INDEX TO APPENDIX iv

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL PROVISIONS 2

STATEMENT OF THE CASE 2

A. Summary Of The Issues 2

B. Procedural History 12

REASONS FOR GRANTING THE PETITION 13

I. THE FIFTH CIRCUIT ERRED IN REVERSING THE DISTRICT COURT'S GRANT OF HABEAS CORPUS RELIEF BASED ON INEFFECTIVE ASSISTANCE OF COUNSEL AT THE PUNISHMENT STAGE OF A DEATH PENALTY TRIAL BY DEFERRING TO A STATE COURT PREJUDICE DETERMINATION THAT WAS CONTRARY TO OR INVOLVED AN UNREASONABLE APPLICATION OF CLEARLY ESTABLISHED SUPREME COURT PRECEDENT. 13

TABLE OF CONTENTS – CONTINUED

Page

II. THE FIFTH CIRCUIT ERRED IN HOLDING THAT THE STATE COURT REASONABLY DETERMINED THAT TRIAL COUNSEL MADE A SOUND STRATEGIC DECISION NOT TO PRESENT ANY EVIDENCE OF PETITIONER'S DISADVANTAGED BACKGROUND IN A CAPITAL CASE WHERE, IN ITS ABSENCE, THE JURY WAS DEPRIVED OF MEANINGFUL MITIGATING EVIDENCE THAT COULD HAVE RESULTED IN A LIFE SENTENCE 26

III. THE FIFTH CIRCUIT ERRED IN HOLDING THAT THE FEDERAL DOCTRINE OF WAIVER PRECLUDES A FEDERAL HABEAS COURT FROM CONSIDERING AN ARGUMENT MADE INITIALLY IN A FOOTNOTE IN A STATE COURT BRIEF THAT WAS NOT WAIVED UNDER STATE LAW 34

IV. THE FIFTH CIRCUIT ERRED IN HOLDING THAT A FEDERAL HABEAS PETITIONER WHO PREVAILED IN THE DISTRICT COURT ON AN INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM MUST FILE A SEPARATE NOTICE OF APPEAL AND MOTION FOR A CERTIFICATE OF APPEALABILITY TO RAISE AN ALLEGATION OF DEFICIENT PERFORMANCE THAT THE DISTRICT COURT REJECTED WHERE THE FIFTH CIRCUIT ACQUIRED JURISDICTION OVER THE ENTIRE CLAIM AS A RESULT OF THE RESPONDENT'S APPEAL. 37

CONCLUSION 39

INDEX TO APPENDIX

Page

Opinion of the United States Court of Appeals for the Fifth Circuit ..... App. 1

Order Denying Rehearing ..... App. 14

Final Judgment ..... App. 15

Memorandum and Order of the United States District Court for the Southern District of Texas ..... App. 16

Final Judgment ..... App. 30

Opinion of the Texas Court of Criminal Appeals ..... App. 31

Findings of Fact and Conclusions of Law of the 208th District Court of Harris County, Texas ..... App. 42

TABLE OF AUTHORITIES

Page

CASES

Abdul-Kabir v. Quarterman, 550 U.S. 233 (2007) 21

Beltran v. Cockrell, 294 F.3d 730 (5th Cir. 2002) 38

Brewer v. Quarterman, 550 U.S. 286 (2007) 21

Bridas SAPIC v. Gov't of Turkm, 345 F.3d 347 (5th Cir. 2003) 35

Burger v. Kemp, 483 U.S. 776 (1987) 31

DeGarmo v. State, 691 S.W.2d 657 (Tex. Crim. App. 1985) 17

Ex parte Gonzales, 204 S.W.3d 391 (Tex. Crim. App. 2006) 31

Ex parte Jennings, Nos. AP-75,806 and 75,807, 2008 WL 5049911 (Tex. Crim. App. 2008), cert. denied, 556 U.S. ___, 129 S. Ct. 2052, 173 L.Ed.2d 1136 (2009) 13

Ex parte Smith, 309 S.W.3d 53 (Tex. Crim. App. 2010) 22

Grotto v. Herbert, 316 F.3d 198 (2d Cir. 2003) 38

Jennings v. State, No. AP-70,911 (Tex. Crim. App.), cert. denied, 510 U.S. 830 (1993) 12

Jennings v. Stephens, No. 12-70018, 2013 WL 3787589 (5th Cir. 2013) 13

Penry v. Johnson, 532 U.S. 782 (2001) 9, 34-35

Penry v. Lynaugh, 492 U.S. 302 (1989) 9, 22, 34

Penry v. State, 903 S.W.2d 715 (Tex. Crim. App. 1995) 36

Quick Techs, Inc. v. Sage Group PLC, 313 F.3d 338 (5th Cir. 2002) 36

Simmons v. Leubbers, 299 F.3d 929 (8th Cir. 2002) 33

TABLE OF AUTHORITIES – Continued

Page

CASES

Smith v. Mullin, 379 F.3d 919 (10th Cir. 2004) 25

Smith v. Texas, 550 U.S. 297 (2007) 22

Strickland v. Washington, 466 U.S. 668 (1984) 20

Szabo v. Walls, 313 F.3d 392 (7th Cir. 2002) 38

Wiggins v. Smith, 539 U.S. 510 (2003). 7, 20, 23, 24, 30, 33

Wiley v. Epps, 625 F.3d 199 (5th Cir. 2010) 38

Williams v. Taylor, 529 U.S. 362 (2000) 7, 21, 22, 23

CONSTITUTIONAL PROVISIONS

U.S. CONST. amend. VI 2

U.S. CONST. amend. XIV 2

FEDERAL STATUTES

28 U.S.C § 1254(1) 1

28 U.S.C § 2254(a) 1

28 U.S.C § 2254(d) (1) 21

STATE STATUTE

TEX. CODE CRIM. PROC. art. 37.071(e) (West 1988) 20

Page

RULES

SUP. CT. R. 10(a) 39

SUP. CT. R. 10(c) 26, 31, 34, 37, 39

PETITION FOR A WRIT OF CERTIORARI

Robert Mitchell Jennings respectfully petitions for a writ of *certiorari* to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The opinion of the Fifth Circuit (*App.* 1-13), the order denying rehearing (*App.* 14), and the judgment reversing the grant of habeas corpus relief (*App.* 15) are not reported. The Memorandum and Order of the United States District Court for the Southern District of Texas (*App.* 16-29) and the judgment granting a new trial on punishment (*App.* 30) are not reported. The opinion of the Texas Court of Criminal Appeals (TCCA) denying habeas corpus relief is not reported (*App.* 31-41). The findings of fact and conclusions of law of the 208th District Court of Harris County, Texas, are not reported (*App.* 42-60).

JURISDICTION

The Fifth Circuit reversed the grant of habeas corpus relief on July 22, 2013, and denied rehearing on August 15, 2013. This petition is being timely filed within 90 days of the latter date. This Court has jurisdiction under 28 U.S.C § 1254(1). Petitioner initially invoked federal jurisdiction under 28 U.S.C § 2254(a).

CONSTITUTIONAL PROVISIONS

The Sixth Amendment to the United States Constitution provides, in pertinent part, "In all criminal prosecutions, the accused shall enjoy the right to have the Assistance of Counsel for his defence."

The Fourteenth Amendment to the United States Constitution provides, in pertinent part, "No State shall . deprive any person of life, liberty, or property without due process of law . "

STATEMENT OF THE CASE

A. Summary Of The Issues

Petitioner shot and killed Elston Howard, a Houston Police Department vice officer, during the robbery of an adult bookstore on July 19, 1988 (33 R.R. 34, 36, 38, 112-121).[1]

Petitioner's accomplice, David Harvell, was waiting outside in a car (35 R.R. 563-64). As they drove away, petitioner told Harvell that he shot someone in the store (35 R.R. 565). Minutes later Harvell shot petitioner, who dove out of the passenger window and ran away (35 R.R. 565-66).

Petitioner was admitted to a hospital for treatment of a gunshot wound to his hand (35 R.R. 582-85). The police arrested him in the hospital (34 R.R. 376-81).

[1] Howard was wearing civilian clothing and a police raid jacket (33 R.R. 40-42).

He gave a written confession that his gun discharged when Howard tried to tackle him during the robbery (35 R.R. 554, 563; 36 R.R. 862). The jury convicted him of capital murder (C.R. 487-89).

The State presented evidence at the punishment stage regarding petitioner's criminal history. He was declared delinquent at age 14 and placed on probation in 1972 (39 R.R. 167-71; SX 109). He was sent to a trade school at age 15 as a condition of probation in 1973 (39 R.R. 171-73; SX 110). He was sent to a juvenile facility at age 16 for a probation violation in 1974 (39 R.R. 173-75; SX 111). He was convicted of aggravated robbery at age 17 and sentenced to five years in prison in 1975 (39 R.R. 177-81; SX 115). He was convicted of two aggravated robberies and burglary of a habitation at age 20 and sentenced to concurrent 30-year sentences in 1978 (39 R.R. 181-84; SX 115). He was "handled" for 13 disciplinary violations (eight "minor" and five "major") in prison between June of 1979 and October of 1984 (39 R.R. 120-123). He committed five aggravated robberies in addition to the primary offense at age 30 after he was released from prison in May of 1988 (39 R.R. 16-19, 25-29, 35-41, 72-79, 85-97).

George Burrell, a Harris County Sheriff's Office chaplain, was the only defense witness at the punishment stage (39 R.R. 185-86). Burrell first met petitioner in the jail in July of 1988, saw him two or three times per week, and felt that he had "changed" since they met (39 R.R. 187-89). Burrell did not know of any disciplinary violations committed by petitioner in the jail and did not believe

that he was "incorrigible" (39 R.R. 188, 190-91).

Trial counsel did not conduct a "mitigation investigation" to discover evidence to offer in support of a life sentence because they did not fully appreciate the concept of mitigating evidence as it related to the Texas statutory special issues (1 S.H.C.R. 40-41). They did not investigate whether petitioner had any mental impairment that might mitigate the punishment (1 S.H.C.R. 41). They sought to call petitioner to testify about his disadvantaged background; but, after the trial court refused their request to restrict the cross-examination to the charged offense, they did not call him or a family member to elicit this testimony (39 R.R. 196-200). The jury convicted petitioner and answered the special issues in the affirmative, and the court sentenced him to death in 1989 (C.R. 487-89). His conviction was affirmed on appeal in 1993.

Petitioner filed a state habeas corpus application alleging that trial counsel were ineffective in failing to discover and present mitigating evidence of his mental impairment and disadvantaged background. The ineffective assistance of counsel (IAC) claim was developed through affidavits and documentary evidence in the state habeas proceeding.

Trial counsel failed to review the district clerk's files on petitioner's prior convictions and discover the report of a psychological evaluation reflecting that he demonstrated mild mental retardation and organic brain dysfunction in 1978, although the psychologist surmised that he was malingering (1 S.H.C.R. 46-49).

Psychological evaluation and testing during the state habeas proceeding revealed abnormal findings in his frontal lobes, parietal lobes, and left temporal lobe that support the contention that his brain has been injured (1 S.H.C.R. 72-75). His mother, Flora Jennings, and sister, Carla Jennings, testified that he received head injuries during childhood that required treatment at a hospital (1 S.H.C.R. 77-80). A psychologist concluded that he suffers from periods in which impulsive action overcomes his capacity for reason and foresightful actions; that his capacity for emotional control and self-inhibition is less than that of an unimpaired person; that his condition has a demonstrable physical basis; and that these findings could have been made in 1989 had he been tested (1 S.H.C.R. 67-68).

Petitioner also presented evidence in the state habeas proceeding that his mother conceived him as the result of a rape at age 16; that she frequently told him that she did not want him and could not complete her education because of him; that he lived sporadically with various relatives during childhood and had no positive, lasting, male influence; that he and his younger sister lived in an apartment, supervised by an older cousin, during the week; that his mother used drugs when she came home on the weekends; that he lived in poverty and had only the bare essentials; that he received little adult supervision or love; and that he did poorly in special education classes, dropped out of school in the ninth grade, and began to use drugs (1 S.H.C.R. 77-80). The jury that sentenced him to death did not hear any of this evidence.

1. Petitioner was prejudiced by counsel's failure to discover and present evidence of his mental impairment.

The state habeas district court concluded that counsel were not ineffective in failing to investigate petitioner's mental condition because the evidence did not demonstrate that he suffers from organic brain damage. *App.* 44-45, 57. The TCCA held that, although counsel "may well have performed deficiently" in failing to investigate, discover, and present evidence of petitioner's mental impairment, there was no reasonable probability that, "but for these deficiencies, the outcome of his punishment proceeding would have been different." *App.* 34.

The federal district court held that counsel performed deficiently in this regard; that the state court's prejudice determination was based on an unreasonable determination of the facts; and that there was a reasonable probability that at least one juror would have persisted in a negative answer to a special issue, resulting in a life sentence, had this evidence been presented. *App.* 23-27.

The Fifth Circuit disagreed, holding that the district court erred in failing to defer to the TCCA's determination that petitioner did not establish the requisite prejudice. *App.* 8. However, the Fifth Circuit failed to recognize that the TCCA applied an erroneous standard of review for determining prejudice. The TCCA framed the issue as "whether there is a reasonable probability that [petitioner's] jury would have answered any of the statutory special issues, or would have answered a properly formulated *Penry* instruction, in such a way that [petitioner]

would have received a life sentence instead of the death penalty." *App.* 37-38. The TCCA erroneously required petitioner to demonstrate a reasonable probability that the jury would have reached a verdict on punishment, and at least ten jurors would have answered a special issue in a way that would have resulted in a life sentence. To the contrary, he only had to demonstrate a reasonable probability that at least one juror would have voted against the death penalty, resulting in a mistrial and an automatic life sentence. This Court should grant *certiorari* to determine whether the Fifth Circuit erred in deferring to a state court prejudice determination based on a standard of review that was contrary to or involved an unreasonable application of *Williams v. Taylor*, 529 U.S. 362, 397-98 (2000), and *Wiggins v. Smith*, 539 U.S. 510, 537 (2003).

2. Counsel performed deficiently in failing to present any evidence of petitioner's disadvantaged background.

The state habeas district court concluded that counsel did not perform deficiently in failing to present any evidence of petitioner's disadvantaged background in view of lead counsel Connie Williams' belief that petitioner's mother, Flora, was not sympathetic to him and that his sister, Carla, was relatively young when he was incarcerated. *App.* 48-49, 58. The TCCA upheld this decision without citing any authority for the proposition that it can be a sound strategy not to present any mitigating evidence of a capital defendant's disadvantaged background because the witnesses are imperfect. *App.* 36-37.

The federal district court held that the TCCA reasonably concluded that counsel made a sound strategic decision not to call Flora but unreasonably concluded that counsel made a sound strategic decision not to call Carla, as that decision resulted in "the virtual absence of a mitigation case...." *App.* 22-23, 27-28.

The Fifth Circuit disagreed, holding that the TCCA reasonably determined that counsel made a sound strategic decision not to present any evidence of petitioner's disadvantaged background. *App.* 8-9. It relied substantially on the state court's alleged factual determination that counsel "did not believe that Carla Jennings would be a sympathetic witness." *App.* 8. This conclusion, which was based on respondent's interpretation of Williams' affidavit, is not supported by the state habeas district court's findings of fact or the TCCA's opinion. The state habeas district court found that counsel did not call Flora because he perceived that she "was not sympathetic" to petitioner and did not call Carla because her testimony would not be beneficial, as she was "five to six years younger than [petitioner] who had spent much of his time in juvenile facilities or prison." *App.* 48. The TCCA acknowledged these different reasons in its opinion. *App.* 36. There was no evidence that counsel did not call Carla because she was unsympathetic to petitioner.

The Fifth Circuit's conclusion that the state court reasonably determined that counsel did not perform deficiently in failing to call Carla because he believed that

she was unsympathetic to petitioner is based on a misinterpretation of counsel's affidavit and is contrary to the state habeas district court's findings and the TCCA's opinion. This Court should grant *certiorari*, vacate the judgment, and remand to the Fifth Circuit to reconsider its conclusion that was based on an inaccurate factual premise. Alternatively, this Court should grant *certiorari* to determine whether a state court judge reasonably could conclude that it can be a sound strategy not to present any mitigating evidence of a capital defendant's disadvantaged background because the witnesses are imperfect.

3. The Fifth Circuit improperly applied the federal doctrine of waiver in refusing to consider an argument initially made in a footnote in a state court brief that was not waived under state law.

Petitioner argued in footnote 25 on page 31 of his brief in the TCCA that counsel's deficient performance caused prejudice because, had counsel presented mitigating evidence of his mental impairment and/or disadvantaged background, any death sentence would have been reversed based on the nullification instruction that the jury received in violation of *Penry v. Lynaugh*, 492 U.S. 302 (1989), as interpreted by *Penry v. Johnson*, 532 U.S. 782 (2001). The TCCA held that there was no Eighth Amendment violation in submitting the nullification instruction based on the evidence adduced at trial rather than the evidence that could have been adduced. *App.* 39-40.

The federal district court declined to consider petitioner's *Penry*-based prejudice argument—which he raised in the body of his federal petition—because

it was unexhausted in the state habeas proceeding. *App.* 28.

The Fifth Circuit acknowledged that petitioner established the factual basis to support the argument in state court but concluded that, by making it in a footnote, he did not give the TCCA a "fair opportunity" to consider it. *App.* 10. The Fifth Circuit held that petitioner "only vaguely alerted" the TCCA to the argument and that, as a result, it was unexhausted and procedurally defaulted. *App.* 11.

The Fifth Circuit erred in applying the federal doctrine of waiver to hold that this argument was inadequately briefed in state court. Under Texas law, a ground for relief raised in a footnote, without citation to authority, is inadequately briefed and will not be considered on appeal. The footnote in petitioner's brief contained an argument in support of the prejudice prong of his IAC claim; it was not a separate ground for relief. He adequately briefed it for state court purposes by citing the relevant authorities, and the TCCA addressed it in its opinion, albeit only in passing. Thus, the argument was exhausted in state court and is not procedurally defaulted in federal court. This Court should grant *certiorari*, summarily hold that the federal doctrine of waiver does not preclude a federal habeas court from considering an argument made initially in a footnote in a state court brief that was not waived under state law, vacate the judgment, and remand to the Fifth Circuit to consider the argument.

4. The Fifth Circuit erred in holding that a federal habeas petitioner who prevailed in the district court on an ineffective assistance of counsel claim must file a separate notice of appeal and motion for a certificate of appealability to raise an allegation of deficient performance that the district court rejected.

Petitioner's federal habeas petition presented one ground of IAC at the punishment stage based on three allegations of deficient performance. The district court granted relief on two allegations—the failure to discover and present mitigating evidence of mental impairment and disadvantaged background—but denied relief on the third allegation—counsel's prejudicial argument during summation that he could not quarrel with a death sentence. Petitioner raised the latter claim in a cross-point in his appellate brief but did not timely file a separate notice of appeal and motion for a certificate of appealability (COA). The Fifth Circuit recognized that there is a circuit split on whether a habeas petitioner "can raise arguments in opposition to the state's appeal concerning grounds for relief not adopted by the district court without first seeking a COA." It held that the cross-point was procedurally defaulted based on circuit precedent because petitioner did not timely file a notice of appeal and move for a COA in the district court. *App.* 11-12.

The rule requiring a separate notice of appeal and motion for a COA should apply where a petitioner raises multiple grounds for relief; the district court grants relief on fewer than all of the grounds; the respondent appeals; and the petitioner seeks review of the grounds on which relief was denied. The rule should not apply

where the petitioner raises one ground of IAC; the district court grants relief based on one or more allegations of deficient performance but rejects another allegation; the respondent appeals; and the petitioner seeks review of the rejected allegation of deficient performance. In this scenario, the petitioner need not file a separate notice of appeal and move for a COA in the district court because the appellate court acquires jurisdiction over the entire IAC claim as a result of the respondent's notice of appeal. This Court should grant *certiorari* to resolve the circuit split and, ultimately, vacate the judgment and remand to the Fifth Circuit to consider the rejected allegation of deficient performance.

B. Procedural History

Petitioner pled not guilty to capital murder in cause number 506814 in the 208th District Court of Harris County, Texas. The jury convicted him and answered the statutory special issues in the affirmative, and the court sentenced him to death on July 13, 1989. Connie Williams and Grant Hardeway represented him.

The TCCA affirmed the conviction in an unpublished opinion issued on January 19, 1993. This Court denied certiorari on October 4, 1993. *Jennings v. State*, No. AP-70,911 (Tex. Crim. App.), *cert. denied*, 510 U.S. 830 (1993).

Petitioner filed a state habeas corpus application on September 20, 1996, and supplemented it on June 16, 2001. The district court entered findings of fact and conclusions of law recommending that relief be denied on January 22, 2006. The

TCCA denied relief in an unpublished opinion issued on November 26, 2008. *Ex parte Jennings*, Nos. AP-75,806 and 75,807, 2008 WL 5049911 (Tex. Crim. App. 2008). This Court denied certiorari on April 27, 2009. *Jennings v. Texas*, 556 U.S. ____, 129 S. Ct. 2052, 173 L.Ed.2d 1136 (2009).

Petitioner filed a federal habeas corpus petition on January 27, 2009. The district court granted a new trial on punishment on April 23, 2012. The Fifth Circuit reversed that judgment; denied relief in an unpublished opinion issued on July 22, 2013; and denied rehearing on August 15, 2013. *Jennings v. Stephens*, No. 12-70018, 2013 WL 3787589 (5th Cir. 2013).

REASONS FOR GRANTING THE PETITION

I. THE FIFTH CIRCUIT ERRED IN REVERSING THE DISTRICT COURT'S GRANT OF HABEAS CORPUS RELIEF BASED ON INEFFECTIVE ASSISTANCE OF COUNSEL AT THE PUNISHMENT STAGE OF A DEATH PENALTY TRIAL BY DEFERRING TO A STATE COURT PREJUDICE DETERMINATION THAT WAS CONTRARY TO OR INVOLVED AN UNREASONABLE APPLICATION OF CLEARLY ESTABLISHED SUPREME COURT PRECEDENT.

A state district court ordered a psychological evaluation of petitioner after he was charged with two aggravated robberies and burglary of a habitation in 1978. Dr. J.M. Bloom, a psychologist with the Harris County Psychiatric Hospital, prepared a report on June 21, 1978 (1 S.H.C.R. 46-49).[2] The following portion is pertinent (1 S.H.C.R. 48):

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[2] Dr. Bloom's report was in the district clerk's files on the 1978 cases (2 S.H.C.R. 389-90).

RESULTS:

On the Ammons Test, Mr. Jennings obtained an IQ of 65, which is in the mild mentally retarded range of intelligence.

On the Bender Gestalt, there is evidence of organic brain dysfunction, mild degree.

Dr. Bloom also expressed the opinion that petitioner was malingering (1 S.H.C.R. 48-49).

Connie Williams testified by affidavit in 1996 regarding the defense's preparation for the punishment stage (1 S.H.C.R. 40-43).[3] The defense did not conduct a "mitigation investigation" to discover evidence to offer in support of a life sentence because he did not fully appreciate the concept of mitigating evidence as it related to the special issues (1 S.H.C.R. 40-41). He prepared for the punishment stage by reviewing the penitentiary packets on the prior convictions (which contain the judgments and sentences) rather than the district clerk's files and by interviewing petitioner, his mother, and the chaplain. He did not investigate whether petitioner had any mental impairment that might have contributed to the commission of the offense or that would mitigate the punishment (1 S.H.C.R. 41). He did not know of any prior psychological evaluation, much less that Dr. Bloom prepared a report reflecting that petitioner demonstrated mild mental retardation and organic brain dysfunction in 1978 (1 S.H.C.R. 41-42). He did not consult with a psychologist or request a psychological evaluation because

[3] Williams had defended two capital murder cases at the time of petitioner's trial, one as lead counsel and one as "second chair" (1 S.H.C.R. 40).

he was not aware of Dr. Bloom's report and lacked the expertise to determine from his observations that petitioner might be mentally impaired. His failure to investigate petitioner's mental condition and present evidence of any mental impairment was not strategic; rather, it was a consequence of not knowing about any diagnosed mental impairment and petitioner not exhibiting any mental aberration.[4] Had he read Dr. Bloom's report, he would have requested a psychological evaluation, presented evidence of any mental impairment, and argued that petitioner's diminished mental condition made him less morally culpable for his conduct and constituted a reason to spare his life (1 S.H.C.R. 42).[5]

Petitioner was psychologically evaluated and tested in 1996 during the state habeas proceeding. Dr. Meyer Proler prepared a report regarding a Quantitative EEG (QEEG) that suggested that petitioner has a post-concussive syndrome (1 S.H.C.R. 72-73). Dr. Theodore Simon prepared a report regarding a SPECT-Scan in which abnormal findings in petitioner's frontal lobes, parietal lobes, and left temporal lobe "support the contention" that his brain has been injured (1 S.H.C.R. 75).

Dr. Windel Dickerson, a psychologist, prepared a report regarding a

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[4] The State obtained an affidavit from Williams in 2003 asserting that there was "nothing about [petitioner] to indicate that he suffered from a mental illness or mental retardation" (1 S.H.C.R. 352). This observation is meaningless in view of Williams's acknowledgment that he lacked the expertise to determine that petitioner might be mentally impaired.

[5] Co-counsel Grant Hardeway gave a similar affidavit in 1996 (1 S.H.C.R. 44-45).

neuropsychological examination of petitioner in 1996 and the significance of the findings made by Drs. Bloom, Proler, and Simon. The neuropsychological examination did not confirm that petitioner is mentally retarded, but it suggested that he has "learning problems of a fairly subtle sort, difficulties with emotional stability and difficulty with impulsive behavior" (1 S.H.C.R. 68). The results of the QEEG and SPECT-Scan indicate that, at some point, he received a blow to the head that resulted in organic brain dysfunction (1 S.H.C.R. 67).[6] His prison medical records do not reveal any incident that could account for these findings. He suffers from periods in which impulsive action overcomes his capacity for reason and foresightful action; his capacity for emotional control and self-inhibition is less than that of an unimpaired person; his condition has a demonstrable physical basis; and these findings could have been made in 1989 had he been tested (1 S.H.C.R. 68).

Flora Jennings testified by affidavit in 1996 that petitioner had two head injuries that required treatment at a hospital during childhood. He was in an auto accident in which the car rolled over several times, and he was hit in the head with a baseball bat (1 S.H.C.R. 77-78). Carla Jennings testified similarly by affidavit in 1996 regarding the auto accident (1 S.H.C.R. 79-80).

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[6] Brain "damage" is an injury that causes necrosis or scarring of the tissue and is manifested by anatomical problems. Brain "dysfunction" means that the brain is not working properly; it can occur without any anatomical problems. Brain damage ordinarily produces brain dysfunction. Petitioner has both (1 S.H.C.R. 67).

Edward Mallett, a criminal defense lawyer, testified by affidavit in 1996 regarding his representation of Roger DeGarmo (1 S.H.C.R. 81-83). DeGarmo was convicted of capital murder and sentenced to death.[7] A federal court ordered a new trial because of prosecutorial misconduct. The defense hired Dr. Dickerson as a consulting expert to help prepare for the retrial (1 S.H.C.R. 81). Dr. Dickerson concluded that DeGarmo, although competent and sane, exhibited symptoms consistent with temporal lobe disorder, a form of organic brain damage, and suggested that specialists conduct tests (1 S.H.C.R. 82). The results of a QEEG and a PET-Scan demonstrated that DeGarmo suffered from temporal lobe and frontal lobe dysfunction. The defense presented this evidence at the punishment stage of the retrial. DeGarmo received a life sentence based on the jury's answer to the "mitigation" special issue (1 S.H.C.R. 83).

The State countered that, even had counsel read Dr. Bloom's report, they would not have been obligated to investigate petitioner's mental condition because Dr. Bloom ultimately concluded that petitioner was malingering in order to delay the proceedings (1 S.H.C.R. 48-49). Dr. John Nottingham, a psychiatrist at the Harris County Psychiatric Hospital, also examined petitioner in 1978 and agreed

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[7] DeGarmo kidnapped a young woman in Houston, locked her in the trunk of his car, drove her to another county, and shot her in the head. *DeGarmo v. State*, 691 S.W.2d 657, 659 (Tex. Crim. App. 1985). He achieved lasting infamy when he testified at the punishment stage that he was guilty and that he would kill or have someone kill each juror or members of their families if he were not sentenced to death. *Id.* at 660.

with that diagnosis (1 S.H.C.R. 243-44).[8] Dr. Jerome Brown, a psychologist, examined petitioner prior to trial in 1989 and concluded that he was sane and competent (1 S.H.C.R. 245-47).[9]

The State hired Dr. Victor Scarano, a psychiatrist, in 2002 to review the evidence developed in the state habeas proceeding and prepare a report (1 S.H.C.R. 336-47). Dr. Scarano concluded that petitioner malingered a mental disease or disorder in 1978; that he did not suffer from organic brain dysfunction at the time of the primary offense; and that his conduct during the offense was controlled and deliberate rather than impulsive (1 S.H.C.R. 336).[10]

The state habeas district court adopted the State's proposed findings of fact and conclusions of law verbatim. *App.* 42-60. It concluded that counsel were not ineffective in failing to investigate petitioner's mental condition because the evidence did not demonstrate that he suffers from organic brain dysfunction. *App.* 44-45, 57.

The TCCA held that, although counsel "may well have performed deficiently" in failing to investigate, discover, and present evidence of petitioner's

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[8] Dr. Nottingham observed that petitioner's speech demonstrated that he is "slow" and that his syntax is simple (1 S.H.C.R. 244).

[9] Petitioner did not cooperate with Dr. Brown during the examination (1 S.H.C.R. 245-47).

[10] Dr. Scarano considered it significant that petitioner obtained a GED and college credits in prison and acquired skills as a butcher and a barber (1 S.H.C.R. 342). He believed that the results of the QEEG and SPECT-Scan should not alone be used to make a diagnosis of organic brain dysfunction due to traumatic brain injury (1 S.H.C.R. 337, 345-47).

mental impairment, there was no "reasonable probability that, but for these deficiencies, the outcome of his punishment proceeding would have been different." *App.* 34. The TCCA framed the issue as "whether there is a reasonable probability that [petitioner's] jury would have answered any of the statutory special issues, or would have answered a properly formulated *Penry* instruction, in such a way that [petitioner] would have received a life sentence instead of the death penalty." *App.* 37-38. Although the jury could have decided that brain damage constituted a basis for a sentence less than death, "brain damage would constitute practically the *only* circumstance to be entered on the side of life; there is precious little other evidence of mitigating value to counteract the substantial, non-statutory aggravating circumstances in this case." *App.* 39. Thus, there was no reasonable probability that the jury would have considered the chaplain's testimony and the evidence of brain damage to be sufficiently mitigating to warrant a life sentence. *Id.*

The federal district court held that counsel performed deficiently in this regard; that the state court's finding that there was no prejudice was based on an unreasonable determination of the facts; and that, had this evidence been presented, there was a reasonable probability that at least one juror would have persisted in a negative answer to a special issue, resulting in a life sentence. *App.* 23-27.

The Fifth Circuit disagreed, holding that the district court erred in failing to defer to the TCCA's determination that petitioner did not establish the requisite

prejudice. *App.* 8. However, the Fifth Circuit failed to recognize that the TCCA applied an erroneous standard of review for determining prejudice. The TCCA erroneously required petitioner to demonstrate a reasonable probability that the jury would have reached a verdict on punishment, and at least ten jurors would have answered a special issue in a way that would have resulted in a life sentence. To the contrary, he only had to demonstrate a reasonable probability that at least one juror would have voted against the death penalty, resulting in a mistrial and an automatic life sentence.

The TCCA's prejudice determination conflicts with this Court's clearly established precedent. To prevail on an IAC claim, the defendant must demonstrate "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland v. Washington*, 466 U.S. 668, 694 (1984). A capital defendant must show a reasonable probability that, but for counsel's errors, his death sentence is not worthy of confidence. Texas law in 1989 provided that, if the jurors did not agree on affirmative answers to the special issues, the court had to impose a life sentence. TEX. CODE CRIM. PROC. art. 37.071(e) (West 1988). Thus, prejudice is established in a capital case if there is a reasonable probability that at least one juror would have persisted in a negative answer to a special issue based on the mitigating evidence. *Cf. Wiggins*, 539 U.S. at 537 ("Wiggins' sentencing jury

heard only one significant mitigating factor—that Wiggins had no prior convictions. Had the jury been able to place [his] excruciating life history on the mitigating side of the scale, there is a reasonable probability that at least one juror would have struck a different balance.").[11]

The federal district court granted relief in reliance on *Williams v. Taylor*, *supra*. The TCCA mentioned *Williams* only in passing in a footnote. *App.* 38. The Fifth Circuit attempted to distinguish the cases on the basis that Williams presented "significantly more mitigation evidence" than petitioner. *App.* 6. This Court has rejected a similar comparative analysis in its precedent holding that the Texas nullification instruction was unconstitutional. The underlying principle in the nullification cases is that, if trial counsel introduced testimony regarding the defendant's mental impairment and/or disadvantaged background—which is beyond the scope of the statutory special issues—an appellate court must reverse the death sentence because of the unconstitutional nullification instruction regardless of the quantity or quality of the mitigating evidence. *See Abdul-Kabir v. Quarterman*, 550 U.S. 233 (2007); *Brewer v. Quarterman*, 550 U.S. 286 (2007);

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[11] The TCCA relied exclusively on federal circuit court cases in concluding that petitioner failed to demonstrate prejudice. *App.* 39. These cases were decided under the AEDPA standard of review, which requires a federal habeas petitioner to demonstrate that the state court decision was contrary to or involved an unreasonable application of clearly established Supreme Court precedent. 28 U.S.C. § 2254(d)(1). Federal cases relying on the AEDPA standard do not apply in a state habeas corpus proceeding. The TCCA found no prejudice because it relied on federal cases that were based on the more onerous AEDPA standard of review.

Smith v. Texas, 550 U.S. 297 (2007).[12] The evidence need not be as severe as the abuse suffered during childhood by Johnny Paul Penry. *See Penry v. Lynaugh*, 492 U.S. at 309.[13] Thus, the Fifth Circuit unreasonably applied this Court's precedent in concluding that petitioner did not establish prejudice because the mental impairment in his case was not as severe as in *Williams*.

Williams was in the same procedural posture as petitioner's case when this Court granted *certiorari*. Trial counsel failed to present evidence of Williams' disadvantaged background and possible mental impairment. The state habeas court denied relief after concluding that there was no prejudice based on the facts of the offense and Williams' criminal history. *Williams*, 529 U.S. at 371-72. The federal district court granted relief, concluding that the state court's prejudice determination was based on a factual error and an erroneous interpretation of *Strickland*. *Id.* at 372-73. The Fourth Circuit disagreed, deferring to the state court's prejudice determination because the evidence of future dangerousness was overwhelming. *Id.* at 374. This Court recognized that the federal courts have an independent responsibility to interpret federal law and need not "defer to a state-

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[12] "Nowhere in our *Penry* line of cases have we suggested that the question whether mitigating evidence could have been adequately considered by the jury is a matter purely of quantity, degree, or immutability. Rather, we have focused on whether such evidence has mitigating relevance to the special issues and the extent to which it may diminish a defendant's moral culpability for the crime." *Brewer*, 550 U.S. at 294.

[13] For example, the TCCA set aside a death sentence, despite the absence of an objection to the nullification instruction, where the defense presented mitigating evidence that the defendant's family lived in poverty in a crime-ridden neighborhood. *Ex parte Smith*, 309 S.W.3d 53, 61-64 (Tex. Crim. App. 2010).

court application of the federal law that is, in the independent judgment of the federal court, an error." *Id.* at 379, 387. "If, after carefully weighing all the reasons for accepting a state court's judgment, a federal court is convinced that a prisoner's ... sentence of death ... violates the Constitution, that independent judgment should prevail." *Id.* at 389. The state court in *Williams* analyzed prejudice under the wrong standard by failing to evaluate "the totality of the available mitigating evidence" against the aggravating evidence; as a result, its prejudice determination was contrary to and involved an unreasonable application of *Strickland*. *Id.* at 393-99. Although Williams' evidence "may not have overcome a finding of future dangerousness," it "might well have influenced the jury's appraisal of his moral culpability." *Id.* at 398.

Similarly, in *Wiggins*, the state habeas court concluded that counsel made a reasonable strategic decision to focus his efforts on convincing the jury that Wiggins was not directly responsible for the murder instead of presenting mitigating evidence of his disadvantaged background. *Wiggins*, 539 U.S. at 518. The federal district court granted relief, concluding that the state court unreasonably applied *Williams*. *Id.* The Fourth Circuit disagreed, deferring to the state court's conclusion that counsel made a reasonable strategic decision not to present the mitigating evidence. This Court held that the state court unreasonably applied *Strickland* in deferring to counsel's decision not to present a mitigation

case based on an inadequate investigation. *Id.* at 534.[14] Wiggins had the kind of troubled history that was relevant to the jury's assessment of his moral culpability. *Id.* at 535. Sentencing strategies of focusing on his lack of direct responsibility for the murder and his disadvantaged background were "not necessarily mutually exclusive." *Id.* There was a reasonable probability that at least one juror would have voted against the death sentence had the mitigating evidence been presented. *Id.* at 537.

The Fifth Circuit acknowledged in petitioner's case that, although respondent conceded that petitioner "may have a learning disability ... and ... a brain injury of unspecified type and severity," had counsel presented the Bloom report and the evidence developed in the state habeas proceeding, the State would have presented compelling evidence in rebuttal. *App.* 7. It found no prejudice because, "... at best, [petitioner] relies on the opinions of dueling experts who would have provided conflicting evidence concerning his mental capacity," and he cannot show that "no reasonable jurist would have reached the same conclusion" as the TCCA. *App.* 8. Almost every death penalty case involving mental health issues has "dueling experts." Both the TCCA and the Fifth Circuit assumed, without any factual or legal basis, that all twelve jurors would have believed the prosecution experts instead of the defense experts and that no juror would have believed that petitioner had some degree of mental impairment that made him less

[14] Counsel completely failed to investigate petitioner's mental health history (1 S.H.C.R. 41).

morally culpable for his conduct and, as a result, voted for a life sentence.

The Fifth Circuit erred in deferring to a state court prejudice determination that was based on an erroneous standard of review that required petitioner to demonstrate that the jury would have reached a verdict on punishment, and at least ten jurors would have voted for a life sentence had counsel presented evidence of his mental impairment. The correct analysis under this Court's clearly established precedent is whether, had counsel discovered and presented the evidence of petitioner's mental impairment, there is a reasonable probability that at least one juror would have voted for a life sentence. The evidence presented by petitioner in the state habeas proceeding is "exactly the sort of evidence that garners the most sympathy from jurors." *Smith v. Mullin*, 379 F.3d 919, 942 (10th Cir. 2004). Evidence of his mental impairment perhaps would have explained why he was prone to engage in violent outbursts. *Id.* at 943. Had the jury been able to place his mental impairment "on the mitigating side of the scale, there is a reasonable probability that at least one juror would have struck a different balance." *Id.* at 944. It is irrelevant that the evidence of his mental impairment was not as severe as in *Williams* and *Wiggins* as long as there is a reasonable probability that it could have influenced at least one juror.

This Court should grant *certiorari* to determine whether the Fifth Circuit erred in deferring to a state court prejudice determination that was based on a standard of review that was contrary to or involved an unreasonable application of

Williams and *Wiggins*. SUP. CT. R. 10(c).

II. THE FIFTH CIRCUIT ERRED IN HOLDING THAT THE STATE COURT REASONABLY DETERMINED THAT TRIAL COUNSEL MADE A SOUND STRATEGIC DECISION NOT TO PRESENT ANY EVIDENCE OF PETITIONER'S DISADVANTAGED BACKGROUND IN A CAPITAL CASE WHERE, IN ITS ABSENCE, THE JURY WAS DEPRIVED OF MEANINGFUL MITIGATING EVIDENCE THAT COULD HAVE RESULTED IN A LIFE SENTENCE.

Counsel proffered petitioner's testimony at a hearing outside the presence of the jury that he was raised in an impoverished home by a drug-addicted mother who had been convicted of theft; that he often was left without adult supervision; that he was a poor student who dropped out of school in the ninth grade; and that he was too intoxicated to act deliberately at the time of the offense (39 R.R. 196-99). The trial court denied petitioner's motion to restrict the cross-examination to the charged offense (39 R.R. 198-200). Thereafter, counsel presented testimony from the chaplain but did not present any testimony regarding petitioner's disadvantaged background.

Flora and Carla Jennings testified by affidavit in 1996 regarding petitioner's social history (1 S.H.C.R. 77-80). Flora was raped at age 16, became pregnant, and gave birth to petitioner at age 17 (1 S.H.C.R. 77). She frequently told him that he was conceived as a result of a "date rape" and that she could not complete her education because of him. According to Carla, Flora frequently told him that she did not want him (1 S.H.C.R. 79).

Flora sent petitioner to live with her mother and grandmother on a farm outside Houston because she could not support him. She married in 1962, and petitioner returned to Houston two years later (when he was about six years old) to live with the family. Petitioner's stepfather was seldom at home. Flora soon divorced him, and petitioner had no male role model. Flora lived with and cared for an elderly woman during the week. Petitioner and Carla lived in an apartment, supervised by an older cousin, and received little adult supervision or love. Flora used drugs when she came home on the weekends. The family was poor and had only the bare essentials, such as food and clothing (1 S.H.C.R. 77, 79).

Petitioner performed poorly in special education classes, dropped out of school in the ninth grade, and began to use drugs. He was in and out of reform school and prison from the age of 15. He had no stable influences when he was at home (1 S.H.C.R. 78, 80).

Connie Williams spoke to Flora and Carla a couple of times but did not question them much about petitioner's background or ask them to testify. They would have testified to the facts set forth in their affidavits (1 S.H.C.R. 78, 80).

Williams testified by affidavit in 1996 that he was informed that petitioner was raised by a drug-addicted mother, had a limited education, and abused alcohol. He decided not to offer this evidence after the court denied his motion to restrict the cross-examination of petitioner (1 S.H.C.R. 41).

The State obtained an affidavit from Williams in 2003 asserting that he did

not call Flora or Carla because he did not think that their testimony would be beneficial, as Flora was not sympathetic to petitioner and Carla was quite young when petitioner left home (1 S.H.C.R. 351).[15] The State suggested in its answer in the state habeas proceeding that information contained in offense reports and witness statements not admitted in evidence at trial provided additional reasons not to call them (1 S.H.C.R. 223-25). Petitioner's girlfriend, Wanda Taylor, told the police that Flora placed a wallet containing money stolen in the charged offense in a drawer at Carla's house and that Flora had a bad cocaine habit and may have gone to buy cocaine after visiting petitioner at the hospital. The offense reports reflect that Flora appeared to be high when she gave her statement and that she told the officer that she smoked a cocaine-laced marijuana cigarette earlier that day; he arrested her for possession of a controlled substance after she allowed him to search her purse. Petitioner told the police that Carla took him to the hospital after he was shot and that he gave Flora and Carla money from the robberies. Flora and Carla told the probation officer who prepared the 1978 presentence investigation report that petitioner was very moody and tended to withdraw; was "mixed-up"; was constantly truant from school and in trouble with the law as a juvenile; and acted strange.

The state habeas district court concluded that counsel did not perform

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[15] Petitioner was sent to trade school in 1973, to a juvenile facility in 1974, and to prison in 1975 (39 R.R. 171-81). Carla was born on May 9, 1962 (1 S.H.C.R. 304). She was 11 years old when he first left home. Thus, she was old enough to perceive and remember these events.

deficiently in failing to present evidence of petitioner's disadvantaged background because he believed that the testimony of Flora and Carla would not be beneficial. *App.* 48-49, 58. It cited the two reasons given by Williams—that Flora was not sympathetic to petitioner and that Carla was so young when he left home—and the additional reasons that the State suggested but that Williams did not articulate. *App.* 48-49.[16]

The TCCA held that counsel made a sound strategic decision not to present evidence of petitioner's disadvantaged background through Flora, who was not sympathetic to him, or through Carla, who was relatively young when he was incarcerated. *App.* 36-37. The TCCA did not cite any authority for the proposition that it can be a sound strategy not to present any mitigating evidence of a capital defendant's disadvantaged background because the witnesses are imperfect.

The federal district court held that the TCCA reasonably concluded that counsel made a sound strategic decision not to call Flora but unreasonably concluded that counsel made a sound strategic decision not to call Carla, as that decision resulted in "the virtual absence of a mitigation case " *App.* 22-23, 27-28.

The Fifth Circuit disagreed, holding that the TCCA reasonably determined

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[16] Petitioner asserted in his objections in state court that Williams' explanations were not credible because they were inconsistent with his conduct in proffering the evidence at trial and, in any event, that it is unsound strategy to fail to present any evidence of a capital defendant's disadvantaged background because the witnesses are imperfect (2 S.H.C.R. 433-34).

that counsel made a sound strategic decision not to present any evidence of petitioner's disadvantaged background. *App.* 8-9. It relied substantially on what it categorized as the state court's factual determination that counsel "did not believe that Carla Jennings would be a sympathetic witness." *App.* 8. This conclusion, which was based on respondent's interpretation of Williams' affidavit, is not supported by the state habeas district court's findings or the TCCA's opinion. The state habeas district court found that counsel did not call Flora because he perceived that she "was not sympathetic" to petitioner and did not call Carla because her testimony would not be beneficial, as she was "five to six years younger than [petitioner] who had spent much of his time in juvenile facilities or prison." *App.* 48. The TCCA acknowledged these different reasons in its opinion. *App.* 36. There was no evidence that Carla was unsympathetic to petitioner or that counsel did not call her for that reason.

The Fifth Circuit's conclusion that the state court reasonably determined that counsel did not perform deficiently in failing to call Carla because he believed that she was unsympathetic to petitioner is based on a misinterpretation of counsel's affidavit and is contrary to the state habeas district court's findings and the TCCA's opinion. A state court decision based on an erroneous factual finding is unreasonable. *Wiggins*, 539 U.S. at 528 (state court decision that counsel made sound strategic decision not to present mitigating evidence of defendant's disadvantaged background unreasonable where based on erroneous factual finding

regarding content of records). This Court should grant *certiorari*, vacate the judgment, and remand to the Fifth Circuit to reconsider its conclusion that was based on an inaccurate factual premise. SUP. CT. R. 10(c).

Additionally, the Fifth Circuit failed to give proper consideration to the importance of testimony regarding a capital defendant's disadvantaged background. An appellate court's "duty to search for constitutional error with painstaking care is never more exacting than it is in a capital case." *Burger v. Kemp*, 483 U.S. 776, 785 (1987). Because testimony regarding a capital defendant's disadvantaged background places him in a more sympathetic light before the jury, counsel has a duty to investigate and present this evidence. *Ex parte Gonzales*, 204 S.W.3d 391, 396-97 (Tex. Crim. App. 2006).

Even if Williams truly believed that Carla would not be an effective witness because of her age and limited interaction with petitioner while he was incarcerated, there can be no doubt that her testimony regarding the sordid conditions of their home and the poor parenting skills of their mother would have been beneficial. Indeed, Carla knew petitioner much better than the chaplain, who was the only defense witness at the punishment stage. There was no legitimate reason not to call her, as her testimony regarding his disadvantaged background could not have been impeached.

The Fifth Circuit also concluded that counsel "could reasonably have concluded that resources were better spent focusing the jury's attention on

[petitioner's] lack of future dangerousness rather than attempting to garner support for [petitioner] based on his troubled background." *App.* 9.[17] To the contrary, Williams' strategy was to present evidence of petitioner's disadvantaged background rather than to focus solely on future dangerousness—which was a losing issue. Indeed, he unsuccessfully tried to offer that evidence through petitioner without exposing him to cross-examination beyond the charged offense—a strategy foreclosed by the Texas Rules of Evidence (39 R.R. 198-200). Furthermore, neither Williams nor Hardeway argued at the punishment stage that the chaplain's testimony demonstrated that petitioner would not be dangerous in the future. Their arguments can be summarized as follows:

- petitioner did not act deliberately in firing the shots because everything happened very fast (39 R.R. 233-34);
- petitioner demonstrated remorse during his recorded confession and informed the police of his other robbery victims (39 R.R. 229-30, 235);
- there was no evidence that petitioner committed acts of violence in jail (39 R.R. 238);
- the chaplain has known petitioner for a year and says that he is not incorrigible (39 R.R. 237); and
- although counsel wants the jury to find mitigation that would result in

[17] The Fifth Circuit observed that a capital defendant's disadvantaged background can be a "double-edged sword" because, although it might suggest he is not as morally culpable for his conduct, it also might suggest that, as a product of his environment, he is likely to be dangerous in the future. *App.* 9. This observation carries no weight in petitioner's case, as there was substantial evidence that he would be dangerous outside of prison based on his criminal history; realistically, the only way to persuade a juror to vote to spare his life was to present evidence of his disadvantaged background and argue that it made him less morally culpable for his conduct.

> a life sentence, if the jury cannot do so, counsel "can't quarrel with that"; and nobody will miss petitioner if the jury kills him (39 R.R. 230, 236, 239-40).

Competent counsel would have tried to persuade at least one juror to find that petitioner was less morally culpable for his conduct because of his disadvantaged background and/or that he would not be dangerous in the future because he would be in prison. These sentencing strategies were not "mutually exclusive." *Cf. Wiggins*, 539 U.S. at 535.

The Fifth Circuit acknowledged that the chaplain's testimony regarding petitioner's conduct had only a "tenuous connection" to his moral culpability. *App. 10.* A juror who voted to spare his life probably would do so because he believed that petitioner was less morally culpable for his conduct because of his mental impairment or disadvantaged background rather than because he would not be dangerous in the future. The chaplain's sparse testimony could not have persuaded any juror to do so in view of the facts of the offense and petitioner's criminal history. No state court judge reasonably could conclude that counsel made a sound strategic decision not to present any evidence of petitioner's disadvantaged background under these circumstances. Even if Carla arguably was not a perfect witness, her testimony would have been much more compelling than the chaplain's. *See Simmons v. Leubbers*, 299 F.3d 929, 938-39 (8th Cir. 2002) (state court unreasonably concluded that counsel made sound strategic decision not to present evidence of defendant's troubled background).

Ultimately, the Fifth Circuit concluded that "there was no AEDPA-recognizable error" based on the state court determination that counsel "reasonably could have decided that the risks associated with [Carla's] unsympathetic testimony outweighed any benefits." *App.* 9. There was no evidence that Carla was unsympathetic to petitioner or that counsel did not call her for that reason; and the state court did not so find. Alternatively, this Court should grant *certiorari* to determine whether a state court judge reasonably could conclude that it can be a sound strategy not to present any mitigating evidence of a capital defendant's disadvantaged background because the witnesses are imperfect. SUP. CT. R. 10(c).

III. THE FIFTH CIRCUIT ERRED IN HOLDING THAT THE FEDERAL DOCTRINE OF WAIVER PRECLUDES A FEDERAL HABEAS COURT FROM CONSIDERING AN ARGUMENT MADE INITIALLY IN A FOOTNOTE IN A STATE COURT BRIEF THAT WAS NOT WAIVED UNDER STATE LAW.

Petitioner argued in footnote 25 on page 31 of his brief in the TCCA that counsel's deficient performance caused prejudice because, had counsel presented mitigating evidence of his mental impairment or disadvantaged background, any death sentence would have been reversed based on the nullification instruction that the jury received in violation of *Penry v. Lynaugh*, as interpreted by *Penry v.*

Johnson.[18] The TCCA held that there was no Eighth Amendment violation in submitting the nullification instruction based on the evidence adduced at trial rather than the evidence that could have been adduced. *App.* 39-40.

The federal district court declined to consider petitioner's *Penry*-based prejudice argument—which he raised in the body of his federal petition—because it was unexhausted in the state habeas proceeding. *App.* 28.

The Fifth Circuit acknowledged that petitioner established the factual basis to support the argument in state court but concluded that, by making it in a footnote, he did not give the TCCA a "fair opportunity" to consider it. *App.* 10. It relied on *Bridas SAPIC v. Gov't of Turkm*, 345 F.3d 347, 356 n.7 (5th Cir. 2003), which held—in a footnote, no less—that an argument raised only in a footnote in a brief is waived. The Fifth Circuit, after quoting verbatim the lengthy footnote in petitioner's brief, held that petitioner "only vaguely alerted" the TCCA to the argument and that, as a result, it was unexhausted and procedurally defaulted. *App.* 11.

The Fifth Circuit erred in applying the federal doctrine of waiver to hold that petitioner's argument was procedurally defaulted under Texas law. *Bridas* and the

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[18] Petitioner made this argument in a footnote instead of in the body of the brief because he could not have plausibly contended that the TCCA should vacate the death sentence based only on the unconstitutional nullification instruction, as counsel failed to present evidence at the punishment stage that could not be considered within the scope of the special issues. Rather, petitioner made the observation that, had counsel presented evidence of his mental impairment and/or disadvantaged background, a habeas court ultimately would have vacated the death sentence because of the unconstitutional nullification instruction.

cases on which it relies involve direct appeals in federal cases, which are governed by the Federal Rules of Appellate Procedure. *See Quick Techs, Inc. v. Sage Group PLC*, 313 F.3d 338, 343 n.3 (5th Cir. 2002). The federal rules do not apply to Texas appellate briefs.

Under Texas law, a ground for relief raised in a footnote, without citation to authority, is inadequately briefed and will not be considered on appeal. *Penry v. State*, 903 S.W.2d 715, 765 (Tex. Crim. App. 1995). The footnote in petitioner's brief contained an argument in support of the prejudice prong of his IAC claim; it was not a separate ground for relief. He adequately briefed the argument for state court purposes by citing the relevant authorities, and the TCCA addressed it in its opinion, albeit only in passing. Thus, the argument was exhausted in state court and is not procedurally defaulted in federal court.

The Fifth Circuit's holding also assumes that the TCCA ignores footnotes. Petitioner's one-half page, single-spaced footnote was hard to miss. It is illogical to conclude that the TCCA would consider the argument had it been made in one page of double-spaced text but not in a one-half page, single-spaced footnote.

Petitioner argued in the footnote that counsel's failure to present mitigating evidence of his mental impairment and/or disadvantaged background resulted in prejudice because, had it been presented, a habeas court ultimately would have vacated the death sentence because of the unconstitutional nullification instruction. This Court should grant *certiorari*, summarily hold that the federal doctrine of

waiver does not preclude a federal habeas court from considering an argument made initially in a footnote in a state court brief that was not waived under state law, vacate the judgment, and remand to the Fifth Circuit to consider the argument. SUP. CT. R. 10(c)

IV. THE FIFTH CIRCUIT ERRED IN HOLDING THAT A FEDERAL HABEAS PETITIONER WHO PREVAILED IN THE DISTRICT COURT ON AN INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM MUST FILE A SEPARATE NOTICE OF APPEAL AND MOTION FOR A CERTIFICATE OF APPEALABILITY TO RAISE AN ALLEGATION OF DEFICIENT PERFORMANCE THAT THE DISTRICT COURT REJECTED WHERE THE FIFTH CIRCUIT ACQUIRED JURISDICTION OVER THE ENTIRE CLAIM AS A RESULT OF THE RESPONDENT'S APPEAL.

Petitioner's federal habeas petition presented one ground of IAC at the punishment stage based on three allegations of deficient performance. The district court granted relief on two allegations—the failure to discover and present mitigating evidence of mental impairment and disadvantaged background—but denied relief on the third allegation—counsel's prejudicial argument during summation that he could not quarrel with a death sentence. Petitioner raised the latter claim in a cross-point in his appellate brief but did not file a separate notice of appeal and motion for a COA. The Fifth Circuit recognized that there is a circuit split on whether a habeas petitioner "can raise arguments in opposition to the state's appeal concerning grounds for relief not adopted by the district court without first seeking a COA." *App.* 11. The Seventh Circuit does not require a

federal habeas petitioner to seek a COA when an appeal is already before the court based on the state's appeal of a grant of habeas relief. *Szabo v. Walls*, 313 F.3d 392, 397 (7th Cir. 2002). The Second Circuit does require him to do so. *Grotto v. Herbert*, 316 F.3d 198, 209 (2d Cir. 2003). The Fifth Circuit held that petitioner's cross-point was procedurally defaulted under *Wiley v. Epps*, 625 F.3d 199, 204 n.2 (5th Cir. 2010), because he did not timely file a notice of appeal and move for a COA in the district court. *App.* 12.

The rule requiring a separate notice of appeal and motion for a COA should apply where a petitioner raises multiple grounds for relief; the district court grants relief on fewer than all of the grounds; the respondent appeals; and the petitioner seeks review of the grounds on which relief was denied. *See Beltran v. Cockrell*, 294 F.3d 730, 733 (5th Cir. 2002) (district court granted relief on false testimony claim and denied relief on IAC claim; director appealed; and petitioner cross-appealed to raise IAC claim). The petitioner in *Wiley* failed to do this. The rule should not apply where the petitioner raises one ground of IAC; the district court grants relief based on one or more allegations of deficient performance but rejects another allegation; the respondent appeals; and the petitioner seeks review of the rejected allegation of deficient performance. In this scenario, the petitioner need not file a separate notice of appeal and move for a COA in the district court because the appellate court acquires jurisdiction over the entire IAC claim as a result of the respondent's notice of appeal.

Respondent's notice of appeal stated that he was appealing from the district court's "memorandum and order and final judgment" conditionally granting habeas relief. USCA5 123-25. The Fifth Circuit acquired jurisdiction over the entire IAC claim, which constituted one ground for relief but included all of the allegations of deficient performance. This Court should grant *certiorari* to resolve the circuit split and, ultimately, vacate the judgment and remand to the Fifth Circuit to consider the rejected allegation of deficient performance. SUP. CT. R. 10(a) and (c).

CONCLUSION

Petitioner requests that this Court grant the petition for a writ of *certiorari*, vacate the judgment of the Fifth Circuit, and remand for a new trial on punishment in state court; or, in the alternative, remand to the Fifth Circuit for further consideration.

Respectfully submitted,

RANDOLPH L. SCHAFFER, JR.
Counsel of Record

THE SCHAFFER FIRM
1301 McKinney, Suite 3100
Houston, Texas 77010
(713) 951-9555
(713) 951-9854 (facsimile)
noguilt@swbell.net (e-mail)

Counsel for Petitioner
Robert Mitchell Jennings

Westlaw.

App. 1

— Fed.Appx. —, 2013 WL 3787589 (C.A.5 (Tex.))
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Only the Westlaw citation is currently available.This case was not selected for publication in the Federal Reporter.

Not for Publication in West's Federal Reporter. See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007. See also Fifth Circuit Rules 28.7, 47.5.3, 47.5.4. (Find CTA5 Rule 28 and Find CTA5 Rule 47)

United States Court of Appeals,
Fifth Circuit.
Robert Mitchell JENNINGS, Petitioner–Appellee
v.
William STEPHENS, Director, Texas Department of Criminal Justice, Correctional Institutions Division, Respondent–Appellant.

No. 12–70018.
July 22, 2013.

Background: Following affirmance of his state court conviction for capital murder and his death sentence, and denial of his state habeas petition, petitioner sought federal writ of habeas corpus. The United States District Court for the Southern District of Texas, Lynn N. Hughes, J., 2012 WL 1440387, granted petition. Director of Texas Department of Criminal Justice appealed.

Holdings: The Court of Appeals held that:
(1) counsel's failure to investigate mental impairment was not prejudicial;
(2) counsel's strategic decision not to call sister to testify was not ineffective assistance;
(3) claim regarding nullification instruction was procedurally defaulted; and
(4) ineffective assistance claim regarding closing argument was procedurally barred.

Reversed; petition denied.

West Headnotes

[1] Criminal Law 110 ⟹1960

110 Criminal Law
110XXXI Counsel
110XXXI(C) Adequacy of Representation
110XXXI(C)2 Particular Cases and Issues
110k1958 Death Penalty
110k1960 k. Adequacy of Investigation of Mitigating Circumstances. Most Cited Cases

Any deficient performance by trial counsel in failing to discover psychological report suggesting that defendant was mildly retarded and suffered from organic brain dysfunction and failing to subsequently investigate his mental health was not prejudicial to defendant, as required to support his claim of ineffective assistance of counsel at punishment phase of his capital murder trial that resulted in imposition of death penalty, since there was ample evidence that defendant was malingering and did not suffer from any mental infirmity. U.S.C.A. Const.Amend. 6.

[2] Habeas Corpus 197 ⟹486(5)

197 Habeas Corpus
197II Grounds for Relief; Illegality of Restraint
197II(B) Particular Defects and Authority for Detention in General
197k482 Counsel
197k486 Adequacy and Effectiveness of Counsel
197k486(5) k. Post-Trial Proceedings; Sentencing, Appeal, Etc. Most Cited Cases

State habeas court's conclusion, that defense counsel's failure to call defendant's sister at death penalty phase of his capital murder trial to present mitigation testimony about his disadvantaged background was reasonable strategic decision and not ineffective assistance of counsel, did not unreasonably apply federal law or unreasonably determine facts in light of evidence presented at state habeas proceeding, as would have warranted habeas relief, since state court could reasonably have decided that

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risks associated with sister's unsympathetic testimony outweighed any benefits. U.S.C.A. Const.Amend. 6; 28 U.S.C.A. § 2254.

[3] Habeas Corpus 197 ⇐380.1

197 Habeas Corpus
197I In General
197I(D) Federal Court Review of Petitions by State Prisoners
197I(D)4 Sufficiency of Presentation of Issue or Utilization of State Remedy
197k380 Sufficiency of Presentation; Fair Presentation
197k380.1 k. In General. Most Cited Cases

Habeas petitioner's claim that he was prejudiced by counsel's failure to present background and mental health mitigating evidence during punishment phase of his capital murder trial that resulted in death penalty, allegedly depriving him of argument on appeal that nullification instruction jury received violated his Eighth and Fourteenth Amendment rights, was procedurally defaulted as not exhausted, since defendant established factual basis for his claim but did not provide state habeas court with fair opportunity to consider substance of his argument inserted in footnote at end of his brief. U.S.C.A. Const.Amends. 8, 14; 28 U.S.C.A. § 2254(b)(1).

[4] Habeas Corpus 197 ⇐364

197 Habeas Corpus
197I In General
197I(D) Federal Court Review of Petitions by State Prisoners
197I(D)4 Sufficiency of Presentation of Issue or Utilization of State Remedy
197k362 Particular Remedies or Proceedings
197k364 k. Habeas Corpus. Most Cited Cases

Habeas Corpus 197 ⇐384

197 Habeas Corpus
197I In General
197I(D) Federal Court Review of Petitions by State Prisoners
197I(D)4 Sufficiency of Presentation of Issue or Utilization of State Remedy
197k384 k. Procedural Error; Wrong Court or Remedy. Most Cited Cases

Habeas petitioner's claim that his attorney provided ineffective assistance during his closing argument at capital murder trial by allegedly conceding defeat and stating that he could not quarrel with jury's decision imposing death penalty was procedurally barred, where petitioner failed to file timely notice of appeal 14 days after Director of Texas Department of Criminal Justice filed his notice of appeal of district court's grant of habeas relief on petitioner's two other claims, and petitioner failed to first obtain certificate of appealability (COA). 28 U.S.C.A. §§ 2253(c), 2254; F.R.A.P.Rules 4(a)(1)(A), 4(a)(3), 28 U.S.C.A.

Randolph Lee Schaffer, Jr., Schaffer Firm, Houston, TX, for Petitioner–Appellee.

Andrew S. Oldham, Deputy Solicitor General, Office of the Attorney General, Office of the Solicitor General, Ellen Stewart–Klein, Assistant Attorney General, Office of the Attorney General, Postconviction Litigation Division, Austin, TX, for Respondent–Appellant.

Appeal from the United States District Court for the Southern District of Texas, USDC No. 4:09–CV–219.

Before STEWART, Chief Judge, SOUTHWICK and HAYNES, Circuit Judges.

PER CURIAM: [fn*]

*1 In 1989, Robert Mitchell Jennings was convicted of capital murder and sentenced to death. His conviction and sentence were affirmed on direct appeal, and his state habeas application was denied. In 2009, Jennings filed a federal habeas petition, al-

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leging that his attorneys were ineffective for failing to present evidence of his disadvantaged background and for failing to find and present evidence of his mental impairment. The district court agreed and granted habeas relief. The Director of the Texas Department of Criminal Justice filed a timely notice of appeal. We REVERSE and RENDER.

FACTS AND PROCEDURAL HISTORY

On July 19, 1988, Jennings shot and killed Elston Howard, an officer with the Houston Police Department. Officer Howard was in the process of arresting the clerk of an adult bookstore when Jennings entered the store, intending to commit a robbery. Jennings shot Officer Howard four times in the back and head and then robbed the store clerk.

A jury convicted Jennings of capital murder. During the punishment phase, the State of Texas presented evidence of Jennings' lengthy criminal history. At the age of fourteen, Jennings was declared a delinquent and placed on probation. At seventeen, he was convicted of aggravated robbery and sentenced to five years' imprisonment. At twenty, he was convicted of two more aggravated robberies and a burglary and sentenced to concurrent thirty-year sentences. Within two months of his release, he committed six more aggravated robberies, including the one that resulted in Officer Howard's death.

George Burrell, the jail chaplain, was the only defense witness called during the punishment phase. Burrell testified that he met Jennings in the county jail shortly after Jennings' arrest for Officer Howard's murder. Burrell saw Jennings two to three times a week, and he testified that he did not believe Jennings was "incorrigible." No other mitigation evidence was presented.

In 1996, Jennings filed a state habeas application, alleging he received ineffective assistance of counsel at the punishment phase. Specifically, he claimed that his attorneys were ineffective for failing to call his mother and sister to testify regarding his disadvantaged background and for failing to find and present a 1978 psychological report, which suggested that Jennings had "mild organic brain dysfunction" and was mildly mentally retarded.

The state court found that Jennings' attorneys had performed a sufficient investigation into Jennings' background. As part of that investigation, counsel interviewed Flora and Carla Jennings, his mother and sister, respectively. Connie Williams, one of Jennings' attorneys, submitted an affidavit explaining that he decided not to call Jennings' mother because he perceived her as "not very sympathetic" to Jennings. He reached the same conclusion with respect to Jennings' sister Carla. One of the attorney's concerns was that Jennings had been in and out of prison for most of his sister's life. The state court concluded that counsel's decision not to present testimony from either Flora or Carla Jennings was reasonable trial strategy.

*2 The state court also found that Jennings had failed to show he was mentally retarded or suffered from organic brain dysfunction. The state court considered the 1978 psychological report completed by Dr. J.M. Bloom (the "Bloom Report"). [FN1] In his report, Dr. Bloom suggested that Jennings was mildly retarded and suffered from organic brain dysfunction. The court noted that Dr. Bloom believed Jennings was malingering.

The state court also considered the reports from the more recent psychological evaluations performed on Jennings in connection with the state habeas proceedings. In 1996, a quantitative electroencephalography ("QEEG") test was performed on Jennings. The QEEG revealed "dysfunction in the frontal and temporal areas of the applicant's brain." A single photon emissions tomography ("SPECT") study was also performed, and it revealed "the presence of frontal and left temporal lobe impairment." The SPECT and QEEG results were then evaluated by a psychologist, who concluded that Jennings' "capacity for emotional control and self-inhibition" was impaired.

The state court found that the conclusions

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reached based on the SPECT and QEEG results were unpersuasive given the contrary evidence that Jennings was smart and did not suffer from any mental defects. A 1978 pre-sentence investigation report revealed that Jennings had obtained his G.E.D. and had completed over forty hours of college credit while incarcerated. A 1989 psychological evaluation performed by the Texas Department of Corrections ("TDC") indicated that Jennings had no history of mental health problems and voiced no psychological complaints. A TDC social summary report reflected that Jennings had obtained a barber's license and a butcher's certificate while incarcerated. Accordingly, the state court recommended that the Texas Court of Criminal Appeals deny Jennings' request for habeas relief. The Court of Criminal Appeals accepted the recommendation and denied relief.

In 2009, Jennings filed a petition under 28 U.S.C. § 2254 in the United States District Court for the Southern District of Texas. The district court granted the petition, finding that Jennings had received ineffective assistance of counsel. Specifically, the court found that counsel was ineffective for failing to present testimony regarding Jennings' disadvantaged background and for failing to uncover the Bloom Report and perform a subsequent investigation into Jennings' mental health.

The court acknowledged the "legitimate risks" associated with calling Jennings or his mother to testify regarding his background, then concluded that counsel's decision not to call them was reasonable trial strategy. The court found that the decision not to call his sister Carla "made no sense." The court reasoned that while she may not have had a close relationship with Jennings, she still could have testified regarding the difficult circumstances of their home life. The court explained that while each individual decision not to call a specific witness may have made sense in isolation, the failure to present *any* evidence of Jennings' disadvantaged background was not reasonable trial strategy.

*3 The district court also found that Jennings' counsel was deficient for failing to uncover the Bloom Report. The court acknowledged Dr. Bloom's concern that Jennings was malingering; even so, the court noted that Dr. Bloom concluded that Jennings suffered from mild mental retardation and organic brain dysfunction. The court held that counsel was deficient for failing to adequately investigate and uncover evidence of Jennings' mental impairment.

Finally, the district court found that counsel's failure to investigate, develop, and present mitigation evidence prejudiced Jennings. The court concluded that evidence of Jennings' disadvantaged background and his mental impairments "might have been sufficient to convince at least one juror that Jennings did not deserve the death sentence."

DISCUSSION

This case is governed by the Antiterrorism and Effective Death Penalty Act. Under AEDPA, a federal court may not grant habeas relief after an adjudication on the merits in a state court proceeding unless the state court's decision (1) "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States" or (2) "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d). Moreover, a state court's factual findings are presumed to be correct unless the applicant rebuts the presumption by clear and convincing evidence. 8 U.S.C. § 2254(e)(1).

When reviewing a district court's grant of habeas relief, issues of law are reviewed *de novo* and factual findings are reviewed for clear error. *Woodfox v. Cain*, 609 F.3d 774, 788–89 (5th Cir.2010). "A claim of ineffective assistance of counsel presents a mixed question of law and fact. If the district court's findings of fact are not clearly erroneous, we will independently apply the law to the facts as found by the district court." *Id.* (citation omitted).

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All of Jennings' habeas claims relate to the issue of whether he received ineffective assistance of counsel at the punishment phase. To succeed in this claim, Jennings must demonstrate that his attorneys performed deficiently and that such performance prejudiced him. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Deficient performance exists when an attorney's conduct falls "below an objective standard of reasonableness." *Id.* at 688. An attorney's effective assistance at least includes conducting a "reasonably substantial investigation" into potential defenses. *Id.* at 680. Nonetheless, the Supreme Court has "declined to articulate specific guidelines for appropriate attorney conduct and instead [has] emphasized that 'the proper measure of attorney performance remains simply reasonableness under prevailing professional norms,' " *Wiggins v. Smith*, 539 U.S. 510, 521, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003) (quoting *Strickland*, 466 U.S. at 688).

Demonstrating prejudice requires the defendant to "show that there is a reasonable probability that, but for counsel's unprofessional errors, the results of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. The *Strickland* standard does not require the petitioner to show it was more likely than not that the outcome would have been different. *Woodford v. Visciotti*, 537 U.S. 19, 22, 123 S.Ct. 357, 154 L.Ed.2d 279 (2002). Instead, "[u]ndermining confidence in the outcome is exactly *Strickland's* description of what is meant by the reasonable probability standard." *Id.* at 23 (quotation marks omitted). Further, although "[j]udicial scrutiny of counsel's performance must be highly deferential ..., strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Strickland*, 466 U.S. at 689–91.

*4 At the time of Jennings' trial, Texas law provided that a death sentence could not be imposed unless the jurors unanimously answered three special issues in the affirmative; it permitted jurors to answer the special issues in the negative only if "10 or more jurors agree." TEX.CODE CRIM. PROC. ANN. art. 37.071(d)-(e) (West 1985). Therefore, Jennings can show he would not have been sentenced to death by this panel of jurors if he can establish a "reasonable probability" that one juror would have persisted in a negative answer to one of the special issues based on evidence that his attorneys did not discover or present. Importantly, AEDPA deference requires that Jennings establish that all reasonable jurists would agree that he was prejudiced, which means that no reasonable person could adopt the state habeas court's position that no prejudice occurred. *See Yarborough v. Alvarado*, 541 U.S. 652, 664, 124 S.Ct. 2140, 158 L.Ed.2d 938 (2004).

A. Mental Impairment

Jennings argues that his attorneys' failure to discover the Bloom Report and perform a subsequent investigation into his mental health constitutes deficient performance and that the state habeas court's conclusion to the contrary is unreasonable.[FN2]

[1] In his affidavit, Williams admitted that he had failed to review the case files from Jennings' prior convictions, which contained the Bloom Report. He further stated that if he had known about the report, he would have "requested further psychological evaluation." The Director acknowledges these statements but contends that regardless of what Jennings' attorney did or not did not review, every document in existence at the time of trial showed that Jennings was intelligent and did not suffer from any mental impairment. Stated another way, Jennings has failed to show prejudice under *Strickland*. We agree.

Dr. Bloom stated that his evaluation of Jennings revealed a low IQ and mild organic brain dysfunction, but he also concluded that Jennings was

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malingering. The relevant portion of the Bloom Report reads:

> Although the results of psychological assessment techniques suggest[ ] the presence of mild mental[ ] retardation and mild organic brain dysfunction, it is [my] opinion that these are not severe enough to produce the kind of deficits which Mr. Jennings manifested during [the] interview. It is felt that he is attempting to present himself as a mentally ill person in order to delay proceedings.

The Bloom Report's statement that these conditions were enhanced by Jennings' malingering does not necessarily excuse his attorneys' failure to perform a mental-health investigation. Indeed, the Texas Court of Criminal Appeals noted that Jennings' attorneys "may well have performed deficiently" by not conducting a mental-health investigation based on the Bloom Report. It explained that "[e]ven if Dr. Bloom himself attributed the applicant's test results to malingering, it is arguable that his report should nevertheless have sufficed to alert competent trial counsel that further psychological evaluation would be appropriate." In the end, the court did not decide this issue because it determined that even if Jennings' attorneys performed deficiently, their failure to perform a mental-health investigation did not prejudice Jennings.

*5 The district court disagreed. It held counsel to be deficient for failing to uncover the Bloom Report and investigate Jennings' mental health. The district court relied on *Williams v. Taylor*, 529 U.S. 362, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000). In *Williams*, the Supreme Court held that the defendant's attorneys performed deficiently when "[t]hey failed to conduct an investigation that would have uncovered extensive records graphically describing [the defendant's] nightmarish childhood, not because of any strategic calculation but because they incorrectly thought that state law barred access to such records." *Id.* at 395. Attorneys deficiently performed when they failed to uncover or introduce a "voluminous amount" of available evidence, including that the defendant was "borderline mentally retarded." *Id.* at 396.

The Supreme Court has also explained that a defendant's attorney "has a substantial and important role to perform in raising mitigating factors both to the prosecutor initially and to the court at sentencing. Investigation is essential to fulfillment of these functions." *Wiggins*, 539 U.S. at 524–25 (quoting 1 ABA Standards for Criminal Justice 4–4.1, cmt., p. 4–55 (2d ed.1982)). The *Wiggins* Court went on to conclude that the representation provided by Wiggins' attorneys fell below the *Strickland* standard when they failed "to expand their investigation beyond the [presentence investigation report] and the [Department of Social Services records]." *Id.* at 524.

Jennings' attorneys admit that "fail[ing] to investigate Mr. Jennings' mental status or present evidence of his mental impairment was not strategic; rather, it was a consequence of our lack of knowledge of any diagnosed mental impairment." The district court considered the similarities between Jennings' case and *Williams* "too strong to ignore." One distinction we see is that there was significantly more mitigation evidence available in *Williams* than here. For example, in addition to the evidence that Williams was "borderline mentally retarded," his attorneys failed to uncover and present evidence that Williams had only achieved a sixth-grade education and had received commendations for helping end a prison drug ring and for returning a prison guard's wallet. *Williams*, 529 U.S. at 396. Further, prison guards would have testified that Williams was the least likely among the inmates to act violently, and a certified public accountant would have testified based on his interactions with Williams during a prison ministry program that he was "thriv[ing] in a more regimented and structured environment." *Id.* We have already summarized the evidence discoverable as to Jennings, and it is not of that magnitude.

Jennings also argues that in light of the evidence that could have been presented supporting a mental deficiency, the Texas Court of Criminal Ap-

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peals unreasonably concluded that his attorneys' errors did not prejudice him. Specifically, he points to the results of the additional psychological evaluations performed as part of the state habeas proceedings. Following the discovery of the Bloom Report by Jennings' state habeas attorney, Jennings' mental condition was evaluated by at least three doctors. Dr. Meyer Poler performed a QEEG test on Jennings. According to Dr. Poler's report, Jennings' QEEG results were consistent with "affective disorder and/or learning disability" and suggested that Jennings might benefit from treatment with antidepressants. The test also suggested that Jennings suffered from post-concussive syndrome —a mild form of traumatic brain injury.

*6 A SPECT study was also performed on Jennings. Dr. Theodore Simon reviewed the results. In his report, Dr. Simon explained that the results of the SPECT test revealed abnormalities in certain parts of Jennings' brain that "support the contention" that Jennings had suffered from a brain injury. The results of the QEEG and the SPECT test were reviewed by Dr. Windel Dickerson. In his report, Dr. Dickerson concluded that Jennings was not mentally retarded. Dr. Dickerson nevertheless concluded that the QEEG and SPECT tests confirmed that "Mr. Jennings suffers from periods in which impulsive action overcomes the capacity for reason and foresightful action." Dr. Dickerson further explained that "Mr. Jennings' capacity for emotional control and self-inhibition is less than that of an unimpaired person and his condition has a demonstrable physical basis."

The Director responds to these reports by admitting that Jennings "may have a learning disability, may benefit from antidepressants, and may have a brain injury of unspecified type and severity." The Director nonetheless contends that the presentation of the Bloom Report and the findings of a subsequent investigation would not have served Jennings' interests because they would have led the State to present evidence that Jennings is mentally sound. For instance, the State could have presented the report of Dr. John Nottingham, who performed an independent psychiatric examination of Jennings the day after Dr. Bloom. In his report, Dr. Nottingham explained that his findings "are consistent with a person who is attempting to appear to be mentally disturbed on a voluntary basis." He concluded that "[t]here does not appear to be a disease of the mind or mental defect which would interfere with [Jennings'] ability to consult with his attorney."

Also, prior to Jennings' capital trial in 1989, the court ordered Dr. Jerome Brown to perform a competency evaluation. Dr. Brown concluded that "[n]one of the information that is available at present suggests that [Jennings] was suffering from any severe mental illness or mental defect at the time the alleged offense took place" and that he was of sound mind at the time of the crime. Moreover, the State hired Dr. Victor Scarano during the state habeas proceedings to offer his opinion of Jennings based on evidence that had been collected by other doctors. Dr. Scarano did not examine Jennings; instead, his conclusions were based on his review of the psychological reports mentioned above along with other documents bearing on Jennings' mental status. Dr. Scarano concluded that Jennings "was malingering a mental disease or disorder" during his interactions with Drs. Bloom and Nottingham. Dr. Scarano also concluded that Jennings "was not mentally retarded or suffering from an organic brain dysfunction " at the time of the primary crime, which the report found "was not an impulsive act but a controlled and deliberate act."

Dr. Scarano also criticized Dr. Dickerson's reliance on the QEEG and SPECT tests. With respect to the QEEG test, Dr. Scarano noted that "[a] specific clinical advantage has yet to be unequivocally demonstrated for any of the quantitative EEG or mapping techniques." He explained that "a QEEG is insufficient to diagnose brain damage, but may be confirmatory of a diagnosis of brain damage." Dr. Scarano also pointed to several deficiencies in the SPECT test, which Dr. Simon had emphasized

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in his report. For example, Dr. Simon noted that "[n]o information was available regarding the binding or age on the tracer used in this examination"—a significant limitation given that the tracer molecule used in the test is "highly unstable" and "should be injected within fifteen minutes of preparation." Dr. Simon also noted that the "banded color table ... used for imaging the data" was not provided to him. Dr. Scarano found it problematic that despite stating he lacked important information bearing on the reliability of the study, Dr. Simon nonetheless concluded Jennings had suffered a brain injury.

*7 In addition to these reports, the Director urges that there was ample evidence that Jennings did not suffer from any mental infirmity. Specifically, he points to Jennings' scholastic achievements while incarcerated, his professional certifications, and his score of 105 on an IQ test. The Director contends that this evidence further demonstrates that Jennings was not prejudiced by his attorneys' failure to investigate his mental condition.

Based on the above, Jennings has failed to establish prejudice. At best, Jennings relies on the opinions of dueling experts who would have provided conflicting evidence concerning his mental capacity. This is insufficient to meet the burden under AEDPA's deferential standard, which requires Jennings to show that no reasonable jurist would have reached the same conclusion as the state habeas court. The Court of Criminal Appeals did not reach an unreasonable conclusion regarding the lack of prejudice, and under AEDPA its decision should stand.

B. Disadvantaged Background

Jennings also argues that his attorneys provided ineffective assistance by failing to present the mitigation testimony of himself, his mother, or his sister. The Texas Court of Criminal Appeals rejected Jennings' claim on all three points. The district court held that the state court's conclusion was unreasonable to the extent that it found that the failure to call Jennings' sister did not result in ineffective assistance. The Director contends that the decision to call a prison chaplain, whose testimony presented fewer risks than the testimony of Jennings or his family members, was a fully informed strategic decision and did not amount to ineffective assistance.

In evaluating whether Jennings' attorneys were deficient, this court is "required not simply to give [Jennings'] attorneys the benefit of the doubt, ... but to affirmatively entertain the range of possible reasons [Jennings'] counsel may have had for" not presenting the testimony of these three individuals. *See Cullen v. Pinholster*, — U.S. —, —, 131 S.Ct. 1388, 1407, 179 L.Ed.2d 557 (2011) (citation and quotation marks omitted). Indeed, an attorney may decline to present evidence of a defendant's background during the penalty phase and instead focus on "convinc[ing] the jury that [the defendant] would not be a future danger in prison." *Perkins v. Quarterman*, 254 F. App'x 366, 371 (5th Cir.2007) (unpublished); *see also Brown v. Thaler*, 684 F.3d 482, 498–99 (5th Cir.2012).

The Texas Court of Criminal Appeals credited several reasons that would justify not calling Jennings, his mother, or his sister. For instance, Williams stated in his affidavit that he did not ask Flora Jennings to testify because he determined after interviewing her that she "was not very sympathetic to Jennings." Similar to the problem posed by calling Flora Jennings, Williams did not believe that Carla Jennings would be a sympathetic witness. In addition, Williams suggested in his affidavit that Carla Jennings would not be a beneficial witness because she was several years younger than Jennings and had little interaction with him given that he had been in and out of juvenile detention and prison for most of her life. Thus, she had limited knowledge of Jennings' upbringing. There were also legitimate risks associated with calling the defendant Jennings given that his attorneys were unable to persuade the trial court to allow him to testify about his background without being subjected to full cross-examination.

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*8 The district court concluded it was reasonable for counsel not to call either Jennings himself or his mother as witnesses. With respect to the sister Carla Jennings, though, the court complained that the "explanation for not calling Jennings' sister makes no sense." In the district court's view, the fact that Carla Jennings did not have a close relationship with her brother had no bearing on her ability to testify about the conditions at home.

[2] Although Carla Jennings may have been the best available option to present evidence concerning Jennings' background, we conclude there was no AEDPA-recognizable error when the state court determined that his attorneys reasonably could have decided that the risks associated with her unsympathetic testimony outweighed any benefits. True, omitting her testimony meant jurors heard no evidence regarding Jennings' disadvantaged background. A capital defendant's disadvantaged background, though, can be a "double-edged" sword that "might permit an inference that he is not as morally culpable for his behavior, [but] also might suggest [that he], as a product of his environment, is likely to continue to be dangerous in the future." *Ladd v. Cockrell*, 311 F.3d 349, 360 (5th Cir.2002); *see also Brown*, 684 F.3d at 499. Jennings' attorneys could reasonably have concluded that resources were better spent focusing the jury's attention on Jennings' lack of future dangerousness rather than attempting to garner support for Jennings based on his troubled background. As such, it was not unreasonable for the Texas Court of Criminal Appeals to conclude that Jennings' attorneys were not deficient with respect to their strategic decision to omit evidence of Jennings' background.

C. *Penry* Claim

Because we have determined that the state habeas court's conclusion that Jennings' attorneys were not deficient with respect to the omission of evidence on Jennings' background is reasonable, we need not consider whether counsel's decision prejudiced Jennings. Nonetheless, we address Jennings' argument that he suffered prejudice because "had counsel introduced mitigating evidence of [his] mental impairment and disadvantaged background," any death sentence he received would have been reversed based on the nullification instruction the jury received in violation of *Penry v. Lynaugh*, 492 U.S. 302, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989) (*Penry I*), as interpreted by *Penry v. Johnson*, 532 U.S. 782, 121 S.Ct. 1910, 150 L.Ed.2d 9 (2001) (*Penry II*).

Penry requires that jurors be provided the opportunity to "fully consider [ ] the mitigating evidence as it [bears] on the broader question of [the defendant's] moral culpability." *Penry II*, 532 U.S. at 787. "[I]t is only when the jury is given a vehicle for expressing its reasoned moral response to [mitigating] evidence in rendering its sentencing decision ... that [the court] can be sure that the jury has treated the defendant as a uniquely individual human being and has made a reliable determination that death is the appropriate sentence." *Id.* at 797 (citation and quotation marks omitted) (finding a nullification instruction unconstitutional because a "reasonable juror could well have believed that there was no vehicle for expressing the view that [the defendant] did not deserve to be sentenced to death based upon his mitigating evidence" (quoting *Penry I*, 492 U.S. at 326)). Indeed, the "statutory special issues presented to the jury at sentencing and the prosecutor's closing arguments regarding those special issues" must allow the jury to give "meaningful consideration and effect to all of [the defendant's] mitigating evidence." *Pierce v. Thaler*, 604 F.3d 197, 201 (5th Cir.2010).

*9 This special instruction requirement was first announced by the Supreme Court on June 26, 1989, in *Penry I*. 492 U.S. at 328. The guilt phase of Jennings' trial followed shortly thereafter on July 5, 1989. In light of *Penry I*, the court gave Jennings' jury the following nullification instruction:

> When you deliberate about the questions posed in the Special Issues, you are to consider mitigating circumstances and factors, if any, supported by the evidence presented in both phases of trial. A

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> mitigating circumstance may be any aspect of the Defendant's character and record or circumstances of the crime which you believe makes a sentence of death inappropriate in this case. If you find that there are any mitigating circumstances, you must decide how much weight they deserve and give them effect when you answer the Special Issues. If you determine that, in consideration of this evidence, [ ] a life sentence rather than a death sentence, is an appropriate response to the personal moral culpability of the Defendant, you are instructed to answer the Special Issue under consideration "No."

Notably, Jennings' attorneys requested this instruction and did not object to it as inadequate. Jennings was sentenced to death, and his conviction became final in 1993. In 2001, the Supreme Court in *Penry II* held that a jury instruction that was substantially similar to the instruction provided to Jennings' jury did not satisfy the Eighth Amendment's mitigation-instruction requirement as established by *Penry I*. *See Penry II*, 532 U.S. at 789–90, 803–04.

Based on the similarity between the instruction Jennings' jury received and the instruction the Supreme Court found inadequate in *Penry II*, Jennings argued in his state habeas proceeding that his Eighth Amendment right to a special instruction had been violated. After noting that Jennings' "*Penry* claim is limited to evidence adduced at his trial, and does not include the jury's ability to render a reasoned moral response to mitigating evidence he now claims *should* have been adduced," the Texas Court of Criminal Appeals determined that based on the "circumstances there is no Eighth Amendment deficiency." Specifically, the court explained that "[t]he only mitigating evidence presented at trial was Chaplain Burrell's testimony with respect to the applicant's behavior and demeanor in the jail." This evidence, the court concluded, had only a "tenuous connection" to Jennings' moral culpability and therefore the special instruction was unnecessary. *See Abdul–Kabir v. Quarterman*, 550 U.S. 233, 253 n. 14, 127 S.Ct. 1654, 167 L.Ed.2d 585 (2007) (explaining that a "special instruction is not required when mitigating evidence has only a tenuous connection ... to the defendant's moral culpability"). Consequently, the court did not evaluate the sufficiency of the *Penry* instruction on the merits based on its holding that Jennings presented inadequate mitigating evidence to require an instruction.

*10 On appeal, Jennings does not advance a pure-*Penry* argument. Instead, he argues that the failure to offer mitigating evidence of his background deprived him of an argument on appeal that the nullification instruction violated his Eighth and Fourteenth Amendment rights, which could have resulted in overturning his sentence on direct appeal or by a state or federal habeas court.

The district court did not consider Jennings' *Penry*-based prejudice argument because it found that Jennings failed to exhaust this claim in his state habeas proceeding. "The exhaustion requirement is satisfied when the substance of the federal habeas claim has been fairly presented to the highest state court." *Fisher v. Texas*, 169 F.3d 295, 302 (5th Cir.1999); *see also Picard v. Connor*, 404 U.S. 270, 275, 92 S.Ct. 509, 30 L.Ed.2d 438 (1971). A fair opportunity to consider a claim requires that "all the facts necessary to support the federal claim were before the state courts" and "the habeas petitioner must have fairly presented to the state courts the substance of his federal habeas corpus claim." *Anderson v. Harless*, 459 U.S. 4, 6, 103 S.Ct. 276, 74 L.Ed.2d 3 (1982) (quotation marks omitted).

[3] Although Jennings established the factual basis to support his *Penry*-based prejudice argument, he did not provide the Texas Court of Criminal Appeals with a fair opportunity to consider the substance of his argument—he inserted it in a footnote at the end of his brief. *See Bridas SAPIC v. Gov't of Turkm.*, 345 F.3d 347, 356 n. 7 (5th Cir.2003) (holding that an argument raised only in a footnote of a brief is waived). Specifically, Jennings argued that:

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Had applicant's counsel introduced mitigating evidence of his mental impairment and disadvantaged background, and thereafter objected to the nullification instruction, this Court would be obligated to reverse the death sentence pursuant to *Abdul–Kabir v. Quarterman*, 550 U.S. [233] (2007); *Smith v. Texas*, 550 U.S. [297] (2007); and *Brewer v. Quarterman*, 550 U.S. [286] (2007). However, the jury could consider and give effect to applicant's mitigating evidence of good behavior while confined in jail in answering the future dangerousness special issue. *See Franklin v. Lynaugh*, 487 U.S. 164, 108 S.Ct. 2320, 101 L.Ed.2d 155 (1988). Thus, the nullification instruction was superfluous under controlling Supreme Court precedent because counsel did not present and, thus, the jury was not called upon to consider and give effect to the mitigating evidence of applicant's mental impairment and disadvantaged background. In short, *Penry II* is not applicable.

This argument only vaguely alerted the state habeas court to his *Penry*-based prejudice argument and focused instead on arguing that *Penry II* is not applicable. This passing reference to his *Penry*-based prejudice argument during his state habeas proceedings does not suffice to exhaust his claim. As a result, Jennings is barred from asserting this claim in his federal habeas petition.

Because this claim is unexhausted and procedurally defaulted, Jennings cannot now rely on it to establish prejudice resulting from the failure to present background and mental-health mitigating evidence during the penalty phase. *See* 28 U.S.C. § 2254(b)(1).

D. Closing Argument

*11 Jennings argues in a "cross-point" that his attorney provided ineffective assistance during his closing argument by conceding defeat and stating that he could not quarrel with the jury's decision to find him eligible for the death penalty. Before turning to the merits of Jennings' argument, this court must determine whether his claim is procedurally barred because he did not file a timely notice of appeal and filed a certificate of appealability ("COA") with this court six months after the Director filed his notice of appeal.

[4] A defendant generally must file a notice of appeal of a district court's denial of a federal habeas application within thirty days after the entry of final judgment. *See Bowles v. Russell*, 551 U.S. 205, 207, 127 S.Ct. 2360, 168 L.Ed.2d 96 (2007); *see also* FED. R.APP. P. 4(a)(1)(A). When the opposing side appeals first, the party also seeking to appeal must do so "within 14 days after the date when the first notice was filed, or within the time otherwise prescribed by this Rule 4(a), whichever period ends later." FED. R.APP. P. 4(a)(3). Failure to file a notice of appeal deprives this court of jurisdiction to consider the appellant's claims. *See Bowles*, 551 U.S. at 206–07. Here, although the Director filed a timely notice of appeal, giving the court jurisdiction to consider two of Jennings' ineffective-assistance-of-counsel claims, Jennings did not file a notice of appeal concerning the claim the district court decided against his interest—the closing argument claim.

Jennings also failed to seek a COA from the district court first. The district court must first rule on a petitioner's COA request before this court has jurisdiction to consider it. *See Cardenas v. Thaler*, 651 F.3d 442, 443 (5th Cir.2011). While the State may appeal a grant of habeas relief without seeking a COA, "a state prisoner seeking a writ of habeas corpus has no absolute entitlement to appeal a district court's denial of his petition" and "must first seek and obtain a COA." *Miller–El v. Cockrell*, 537 U.S. 322, 335–36, 123 S.Ct. 1029, 154 L.Ed.2d 931 (2003) (*Miller–El I*) (citing 28 U.S.C. § 2253).

When the State appeals a grant of habeas relief, circuit courts of appeal are split on whether a petitioner can raise arguments in opposition to the state's appeal concerning grounds for relief not adopted by the district court without first seeking a COA. For instance, the Seventh Circuit views the COA requirement in 28 U.S.C. § 2253(c) as a gate-

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keeping function and therefore finds it unnecessary for a petitioner to seek a COA when an appeal is already before the court based on the state's appeal of a grant of habeas relief. *Szabo v. Walls*, 313 F.3d 392, 397 (7th Cir.2002). The court held that Section 2253(c) "deals only with *appeals* by prisoners; it does not mention arguments by prisoners as *appellees* offered in support of relief they have obtained." *Id.* In contrast, the Second Circuit has held that "a habeas petitioner to whom the writ has been granted on one or more grounds may not assert, in opposition to an appeal by the state, any ground that the district court has not adopted unless the petitioner obtains a certificate of appealability permitting him to argue that ground." *Grotto v. Herbert*, 316 F.3d 198, 209 (2d Cir.2003).

*12 This circuit has rejected the idea that a State's appeal displaces Section 2253(c)'s gatekeeping function, and with it the requirement that a petitioner must seek a COA. *See Wiley v. Epps*, 625 F.3d 199, 204 n. 2 (5th Cir.2010). In *Wiley*, the district court granted habeas relief based on the petitioner's claim that he was mentally retarded and ineligible for a death sentence as contemplated by *Atkins v. Virginia*, 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002). *Id.* at 202. The State appealed the district court's grant of habeas relief. *Id.* This court noted that the district court rejected the petitioner's other arguments in support of relief, but the petitioner had failed to file a notice of appeal or seek a COA as to those arguments. *Id.* at 204 n. 2. As a result, the only issue before the court was the petitioner's *Atkins* claim. *Id.*

Jennings does not distinguish *Wiley* or argue in his brief that a notice of cross-appeal or COA is unnecessary to establish jurisdiction. A party seeking to invoke the court's jurisdiction must advance arguments establishing jurisdiction. *Hargrave v. Fibreboard Corp.*, 710 F.2d 1154, 1159 (5th Cir.1983).

Jennings' "cross-point" is DISMISSED and his motion for a COA is DENIED. The judgment granting habeas relief is REVERSED, and judgment is RENDERED, denying habeas relief.

FN* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

FN1. The report, completed ten years before Officer Howard's murder, was prepared as part of a competency evaluation Jennings had been ordered to undergo in connection with the prosecution of aggravated robbery and burglary charges.

FN2. Jennings also urges that this court need not defer to the state habeas court's findings because the Texas Court of Criminal Appeals did not adopt the factual findings of the state district court concerning this issue. The case on which Jennings relies for this proposition, *Guidry v. Dretke*, 397 F.3d 306, 326 (5th Cir.2005), was abrogated by the Supreme Court's decision in *Cullen v. Pinholster*, — U.S. —, 131 S.Ct. 1388, 179 L.Ed.2d 557 (2011). *McCamey v. Epps*, 658 F.3d 491, 497 n. 1 (5th Cir.2011). Further, although it declined to decide the deficient-performance element for the mental-impairment issue, the Court of Criminal Appeals did not disturb the state district court's finding that Jennings' attorneys were not deficient in this regard. *See Ex parte Jennings*, Nos. AP–75806, AP–75807, 2008 WL 5049911, at *2 (Tex.Crim.App. Nov.26, 2008). Because this issue has been decided by the state habeas court, it must be given deference. *See Gregory v. Thaler*, 601 F.3d 347, 353 (5th Cir.2010).

C.A.5 (Tex.),2013.
Jennings v. Stephens
— Fed.Appx. —, 2013 WL 3787589 (C.A.5 (Tex.))

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(Cite as: 2013 WL 3787589 (C.A.5 (Tex.)))

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IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 12-70018

ROBERT MITCHELL JENNINGS,

Petitioner - Appellee

v.

WILLIAM STEPHENS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION,

Respondent - Appellant

Appeal from the United States District Court for the Southern District of Texas, Houston

ON PETITION FOR REHEARING

Before STEWART, Chief Judge, SOUTHWICK and HAYNES, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing is DENIED

ENTERED FOR THE COURT:

United States Circuit Judge

United States Court of Appeals
Fifth Circuit
FILED
July 22, 2013
Lyle W. Cayce
Clerk

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 12-70018

D.C. Docket No. 4:09-CV-219

United States Courts
Southern District of Texas
FILED
SEP 10 2013
David J. Bradley, Clerk of Court

ROBERT MITCHELL JENNINGS,

Petitioner - Appellee

v.

WILLIAM STEPHENS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION,

Respondent - Appellant

Appeal from the United States District Court for the Southern District of Texas, Houston

Before STEWART, Chief Judge, SOUTHWICK and HAYNES, Circuit Judges.

JUDGMENT

This cause was considered on the record on appeal and was argued by counsel.

It is ordered and adjudged that the judgment of the District Court granting habeas relief is reversed and rendered, denying habeas relief.

ISSUED AS MANDATE: 21 AUG 2013

A True Copy
Attest
Clerk, U.S. Court of Appeals, Fifth Circuit
By: _____ Deputy
New Orleans, Louisiana
21 AUG 2013

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

ROBERT MITCHELL JENNINGS,	§	
Petitioner,	§	
v.	§	H-09-219
RICK THALER, Director, Texas Department of Criminal Justice-Correctional Institutions Division,	§	
Respondent.	§	

Memorandum and Order

Robert Mitchell Jennings filed a petition for a writ of habeas corpus. Rick Thaler moved for summary judgment. Thaler's motion is denied and Jennings' Petition is granted.

I. Background

The facts are not in dispute. Houston Police Officer Elston Howard was in the Empire Bookstore, a sexually oriented business, arresting the store clerk for violating a city ordinance. Jennings entered to rob the store. He shot Howard twice in the neck. Howard tried to leave the store, but collapsed on the floor. Jennings shot Howard two more times from behind. Howard died.

Jennings was convicted of capital murder. During the penalty phase of Jennings's trial, the State presented evidence of Jennings's extensive criminal history, including juvenile offenses, three aggravated robberies, and burglary of a habitation. Jennings also committed numerous prison disciplinary violations.

Jennings's only witness was a chaplain with the Harris County Sheriff's office. He testified

that Jennings changed for the better during his pretrial detention.

The jury found that Jennings acted deliberately in killing Howard and that there was a probability that Jennings would commit future acts of criminal violence constituting a continuing threat to society. The trial court sentenced him to death. The Texas Court of Criminal Appeals ("TCCA") affirmed the sentence and conviction, *Jennings v. State*, No. AP-70,911 (Tex.Crim.App.), *cert. denied*, 510 U.S. 830 (1993), and denied Jennings's application for a writ of habeas corpus, *Ex Parte Jennings*, Nos. AP-75,806 and 75,807 (Tex.Crim.App. 2008).

II. Discussion

A. The Anti-Terrorism and Effective Death Penalty Act

This petition is governed by the Anti-Terrorism and Effe[redacted] Death Penalty Act ("AEDPA"). *See Lindh v. Murphy*, 521 U.S. 320, 335-36 (1997). Under the AEDPA, this Court cannot grant relief on claims that were decided on the merits by the state courts unless the state court's decision (1) "was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States" or (2) "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d); *Kitchens v. Johnson*, 190 F.3d 698, 700 (5th Cir. 1999).

For questions of law or mixed questions of law and fact decided on the merits in state court, this Court may not grant relief unless the state court decision "was contrary to, or involved an unreasonable application of, clearly established [Supreme Court precedent]." *See Martin v. Cain*, 246 F.3d 471, 475 (5th Cir.), *cert. denied*, 534 U.S. 885 (2001). A state court decision is contrary to clearly established precedent if "'the state court arrives at a conclusion opposite to that reached by . . . [the Supreme Court] on a question of law or if the state court decides a case differently than

... [the Supreme Court] has on a set of materially indistinguishable facts.'" *Dowthitt v. Johnson*, 230 F.3d 733, 740-41 (5th Cir. 2000), *cert. denied*, 532 U.S. 915 (2001) (quoting *Williams v. Taylor*, 529 U.S. 362, 406 (2000)).

The "unreasonable application" standard permits relief only if a state court decision "identifies the correct governing legal rule from [the Supreme Court] cases but unreasonably applies it to the facts of the particular state prisoner's case" or "if the state court either unreasonably extends a legal principle from [Supreme Court] precedent to a new context where it should not apply or unreasonably refuses to extend that principle to a new context where it should apply." *Williams*, 529 U.S. at 406. "In applying this standard, we must decide (1) what was the decision of the state courts with regard to the questions before us and (2) whether there is any established federal law, as explicated by the Supreme Court, with which the state court decision conflicts." *Hoover v. Johnson*, 193 F.3d 366, 368 (5th Cir. 1999). A federal court's "focus on the 'unreasonable application' test under section 2254(d) should be on the ultimate legal conclusion that the state court reached and not on whether the state court considered and discussed every angle of the evidence." *Neal v. Puckett*, 239 F.3d 683, 696 (5th Cir. 2001), *aff'd*, 286 F.3d 230 (5th Cir. 2002) (en banc), *cert. denied sub nom. Neal v. Epps*, 537 U.S. 1104 (2003). The sole question under the 'unreasonable application' prong is "whether the state court's determination is 'at least minimally consistent with the facts and circumstances of the case.'" *Id.* (quoting *Hennon v. Cooper*, 109 F.3d 330, 335 (7th Cir. 1997)); *see also Gardner v. Johnson*, 247 F.3d 551, 560 (5th Cir. 2001) ("Even though we cannot reverse a decision merely because we would reach a different outcome, we must reverse when we conclude that the state court decision applies the correct legal rule to a given set of facts in a manner that is so patently incorrect as to be 'unreasonable.'"). The state court's factual determinations are

presumed correct unless rebutted by "clear and convincing evidence." 28 U.S.C. § 2254(e)(1); *see also Jackson v. Anderson*, 112 F.3d 823, 824-25 (5th Cir. 1997), *cert. denied*, 522 U.S. 1119 (1998).

B. The Standard for Summary Judgment

"As a general principle, Rule 56 of the Federal Rules of Civil Procedure, relating to summary judgment, applies with equal force in the context of habeas corpus cases." *Clark v. Johnson*, 202 F.3d 760, 764 (5th Cir.), *cert. denied*, 531 U.S. 831 (2000). Ordinarily, the "evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor." *Anderson v. Liberty Lobby*, 477 U.S. 242, 255 (1986). When, however, the petitioner fails to show by clear and convincing evidence that the presumption of correctness required by 28 U.S.C. § 2254(e)(1) should not apply to state court findings, those findings are entitled to deference. *See Marshall v. Lonberger*, 459 U.S. 422, 432 (1983); *Sumner v. Mata*, 449 U.S. 539, 547 (1981); *Foster v. Johnson*, 293 F.3d 766, 777 (5th Cir.), *cert. denied sub nom Foster v. Epps*, 537 U.S. 1054 (2002); *Dowthitt v. Johnson*, 230 F.3d 733, 741 (5th Cir. 2000), *cert. denied*, 532 U.S. 915 (2001); *Emery v. Johnson*, 940 F.Supp. 1046, 1051 (S.D. Tex. 1996), *aff'd*, 139 F.3d 191 (5th Cir. 1997), *cert. denied*, 525 U.S. 969 (1998)

C. Summary Judgment

Jennings asserts that he received ineffective assistance of counsel during the penalty phase of his trial. To prevail on a claim for ineffective assistance of counsel, Jennings

> must show that . . . counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed by the Sixth Amendment. Second, the [petitioner] must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

Strickland v. Washington, 466 U.S. 668, 687 (1984). To show deficient performance by counsel,

Jennings must demonstrate that counsel's representation fell below an objective standard of reasonableness. *Id.* at 687-88. Reasonableness is measured against prevailing professional norms, and must be viewed under the totality of the circumstances. *Id.* at 688. Review of counsel's performance is deferential. *Id.* at 689.

In assessing prejudice in a sentencing hearing, "the question is whether there is a reasonable probability that, absent the errors, the sentencer . . would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." *Strickland*, 466 U.S. at 695. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694.

1. Deficient Performance

a. Failure to Present Background Evidence

Counsel wanted Jennings to testify about his upbringing without being subject to cross examination. 39 Tr. at 196-200.[1] When the trial court refused that request, counsel decided not to call Jennings. Jennings now contends that counsel was deficient. He argues that, because the State presented evidence of his criminal past, no additional harm could have come from cross examination. He also observes that his mother and his sister were available to testify about his childhood.

Evidence about Jennings's background would have shown that he grew up in poverty, that he was conceived as a result of a rape, that his mother gave birth to him when she was 17 and blamed his birth for interrupting her education, she resented him for it and made her resentment plain to him,

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[1] "TR" refers to the transcript of Jennings's trial.

and that she was a drug addicted single mother. 1 SH at 77-80.[2] The record shows that counsel elected not to call Mrs. Jennings because she was unsympathetic to Jennings, but Jennings argues that any resentment she displayed on the witness stand would only emphasize his difficult background. Counsel did not call Jennings's sister Carla because he thought she was too young to remember relevant facts when Jennings first entered the juvenile justice system. Jennings points out that she was 12 years old at the time, and argues that she was old enough to remember the family's living conditions. 1 SH at 351.[3]

Counsel did not review the clerk's file from Jennings's previous convictions. That file contained evidence that Jennings has a low IQ and some brain damage, resulting in poor impulse control. Counsel acknowledged that he would have sought expert psychological assistance if he knew of the previous examinations. 1 SH at 41-42. Jennings also argues that counsel's failure to present evidence of low intelligence and mental health problems forfeited a habeas claim that would have resulted in a new sentencing hearing.

1.) Failure to Call Jennings

The state habeas court found that counsel had valid strategic reasons for choosing not to call Jennings, his mother, or his sister. 2SH at 416, 426. Jennings now argues that counsel's opinion that cross examination would harm his case was not valid in light of the State's evidence of his extensive criminal background. The record does not show what counsel feared, but cross examination always

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[2] "SH" refers to the transcript of Jennings's state habeas corpus proceeding.

[3] It is not clear that Carla was 12 years old at the time. Her affidavit indicates that she was born in 1961 or 1962 (her 1996 affidavit states that she was 34 years old), and TDCJ records list Jennings's birthdate as 1957. Carla's affidavit estimates that Jennings entered the juvenile justice system when he was 15, at which time Carla would have been about 10. Nonetheless, a 10 year old is certainly old enough to be aware of her family's living conditions.

carries risks. It may be true that there was no additional evidence of Jennings's criminal history, but counsel could reasonably have feared that Jennings would appear unremorseful, be provoked into an angry outburst, or otherwise appear in an unsympathetic light.

> A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action "might be considered sound trial strategy."

Strickland, 466 U.S. at 689. Because there were legitimate risks, counsel's decision is entitled to deference as a valid strategic decision.

2.) Failure to Call Jennings's Mother

Counsel also stated that he elected not to call Mrs. Jennings because she was unsympathetic to her son. Jennings argues that this would have made her a more potent witness, demonstrating how he grew up without any parental support. While Jennings's argument is compelling, *Strickland* requires great deference to counsel's decisions. Counsel's concerns that Mrs. Jennings's hostility would be harmful, *e.g.*, might convince jurors that Jennings was irredeemable (if even his own mother does not like him), were legitimate, even if Jennings offers a valid argument for viewing the potential impact of the testimony differently. Counsel's decision not to call Mrs. Jennings is within the bounds of counsel's reasonable discretion.

3.) Failure to Call Jennings's Sister

Counsel's explanation for not calling Jennings's sister makes no sense. Counsel stated that Jennings's sister was too young to remember pertinent events. The record shows that she was about

10 years old when Jennings first entered the juvenile justice system. That is certainly old enough to remember conditions at home at the time. Counsel's explanation is therefore contrary to the facts, and the TCCA's conclusion "was based on an unreasonable determination of the facts . . . ." 28 U.S.C. § 2254(d).

Moreover, while counsel's explanations for not calling Jennings or his mother might make sense in isolation, the decision to call *none* of these three potential witnesses, and therefore present *no* evidence of the emotional and economic deprivations of Jennings's background, was not sound trial strategy. Whatever damage counsel may have feared from cross examination of Jennings or Mrs. Jennings's hostility toward her son is far outweighed by the damage caused by presenting *no* evidence at all of Jennings's background, *i.e.*, giving the jury no reason not to impose a death sentence. *Wiggins v. Smith*, 539 U.S. 510 (2003) and *Williams v. Taylor*, 529 U.S. 362 (2000) make clear that failure to present available significant mitigating evidence resulting in the virtual absence of a mitigation case is deficient performance. Considering both the objective unreasonableness of counsel's conclusion that Jennings's sister was too young to remember pertinent events and conditions and the objective unreasonableness of presenting *no* evidence of Jennings's background, the state court's conclusion that counsel was not deficient was unreasonable.

b. Failure to Present Evidence of Low IQ and Mental Health Issues

In 1978, a state court ordered a psychological evaluation to determine Jennings's competency to stand trial after he was charged with two aggravated robberies and burglary of a habitation. The psychologist, Dr. J.M. Bloom, found that Jennings has an IQ of 65 and mild organic brain dysfunction. 2 SH at 391-94. There is evidence that the brain damage was caused by a childhood injury. *Id.* at 77-78.

There is also evidence that Jennings was malingering. 1 SH at 48-49, 336-47. Some of the evidence of malingering is in Dr. Bloom's report. The State presented a report by Victor R. Scarano, M.D. Dr. Scarano states unequivocally that Jennings malingered. His opinion was not based on an examination of Jennings, but on review of documents. *Id.* at 336-47.

The state habeas court found that counsel was not deficient because the evidence did not show organic brain dysfunction. 2 SH at 414, 425. Specifically, the court found that Dr. Bloom stated "that the applicant was malingering or attempting to present himself as a mentally ill individual in order to delay court proceedings." 2 SH at 425. The court's conclusion quotes selectively from Dr. Bloom's report. Bloom concluded that Jennings has low IQ and mild organic brain dysfunction but that he was exaggerating his symptoms in an attempt to appear incompetent to stand trial.

> Although the results of psychological assessment techniques suggests the presence of mild mental[] retardation and mild organic brain dysfunction, it is [my] opinion that these are not severe enough to produce the kind of defects which Mr. Jennings manifested during [the] interview."

Id. at 393. The court's conclusion was based on an unreasonable determination of the facts; Dr. Bloom's report *did* conclude that Jennings has low IQ and brain damage. Counsel, however, did not know this because they never reviewed the clerk's file from Jennings's prior convictions.

"[S]trategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." *Wiggins v. Smith*, 539 U.S. at 521(internal quotation marks and alteration omitted) (quoting *Strickland*, 668 U.S. at 690-91). When assessing the reasonableness of an attorney's investigation, a court must "consider not only the quantum of evidence already known to counsel, but also whether the known

evidence would lead a reasonable attorney to investigate further." *Id.* at 527. Based on the evidence available to counsel at the time of trial, reasonable investigation, *i.e.*, reading the clerk's files from Jennings's prior convictions, would have revealed that Jennings was diagnosed with a low IQ and organic brain damage, and would have led to further investigation and a request for expert assistance. Counsel was deficient for failing to investigate.

c. Closing Argument

In his closing argument at the penalty phase, counsel stated that "I can't quarrel with" a decision to sentence Jennings to death because counsel, like the jurors, lived and worked in Harris County and cared about having a safe community. He nonetheless asked the jurors to give sufficient weight to the mitigating evidence to return a life sentence. 39 Tr. at 239-40. Jennings now argues that this was ineffective.

Counsel was trying to convince the jury to decline to impose a death sentence on a man who they found murdered a police officer. The penalty phase evidence showed that Jennings had a long and violent criminal history. There was virtually no mitigating evidence. It is clear from the record that counsel was trying to identify with the jurors, and to convince them that he was a reasonable man who shared their interest in a safe community. In that posture, he argued that they should still impose a life sentence. In light of the extremely weak mitigation case, the state habeas court's conclusion that this was a plausible strategy was not unreasonable.

2. Prejudice

In determining whether Jennings was prejudiced by counsel's deficient performance, "the question is whether there is a reasonable probability that, absent the errors, the sentencer . . . would have concluded that the balance of aggravating and mitigating circumstances did not warrant death."

Strickland, 465 U.S. at 695. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694. Texas requires a unanimous jury to impose a death sentence. TEX. CODE CRIM PROC. art. 37.071 § 2(d)(2). Therefore, if there is a reasonable probability that even one juror would have voted against a death sentence, then Jennings was prejudiced.

a. Evidence of Brain Damage

One of the special issues the jury had to answer was whether Jennings deliberately killed Howard.[4] The State now argues, and the TCCA found, that evidence of poor impulse control would have been worthless because Jennings murdered Officer Howard in a deliberate manner, approaching Howard from behind and firing the last two shots from point blank range after Howard collapsed. The TCCA concluded that no juror would have found that Jennings acted impulsively, as opposed to deliberately, because "at least two to three seconds" lapsed between the first two shots and the last two. *Ex Parte Jennings*, Nos. AP-75,806 and 75,807 at 15 (Tex. Crim. App. Nov. 26, 2008). This conclusion is unreasonable.

All that was necessary for a "no" answer to the deliberateness special issue was for one juror to find that Jennings acted impulsively and not deliberately. In support of this argument, counsel could have presented evidence that Jennings had organic brain dysfunction resulting in poor impulse control. The TCCA has explained that "[t]he person who engages in certain conduct deliberately has upon consideration said to himself, 'Let's do it.'" *Fearance v. State* 620 S.W.2d 577, 584 n.6 (Tex.Crim.App., 1980). A juror could certainly have found that a brain-damaged man who has poor

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[4] "[W]hether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that ... death ... would result"). *See* former TEX. CODE CRIM. PROC. art. 37.071 § b(1).

impulse control and a low IQ did not engage in that kind of reflection and consideration during a lapse of two or three emotionally charged seconds. The TCCA's contrary conclusion was an unreasonable determination of the facts. *See, e.g., Ex Parte Garrett* 831 S.W.2d 304, 307 (Tex.Crim.App. 1991) (Clinton, J., dissenting on grounds that evidence of brain damage and mental illness not presented at trial raised a reasonable probability of a different outcome).[5]

b. Background Evidence

The factual basis for Jennings's claim is comparable to those in *Wiggins v. Smith*, 539 U.S. 510 (2003) and *Williams v. Taylor*, 529 U.S. 362 (2000). In both cases, counsel failed to investigate and develop a mitigation case. Evidence presented during postconviction proceedings showed that both Wiggins and Williams suffered parental abuse and neglect as children, and had low intelligence (though neither was mentally retarded). *See, e.g.*, 539 U.S. at 516-17, 525; 529 U.S. at 370. Williams, like Jennings, had an extensive criminal history dating to his childhood and including violent offenses. 529 U.S. at 368-69. In each case, the Supreme Court found the petitioner was prejudiced by counsel's failure to investigate, develop, and present mitigating evidence. 539 U.S. at 536; 529 U.S. at 397-98.

"[E]vidence about the defendant's background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background . . . may be less culpable than defendants who have no such excuse."

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[5] Judge Clinton's dissent is not cited as precedent, but as support for the conclusion that there is a reasonable probability the result would have been different if counsel presented the evidence of brain damage and resulting poor impulse control. If a Judge of the Texas Court of Criminal Appeals could find similar evidence in a similar case compelling, then it is reasonably probable that at least one juror could have found that Jennings did not act deliberately.

Penry v. Lynaugh, 492 U.S. 302, 319 (1989).

Evidence about Jennings's background and character, his low intelligence, and his brain damage leading to poor impulse control, might have been sufficient to convince at least one juror that Jennings did not deserve a death sentence. *See Williams*, 529 U.S. at 370 (finding prejudice when counsel failed to present evidence of "neglect during [Williams's] early childhood, as well as testimony that he was borderline mentally retarded, had suffered repeated head injuries, and might have mental impairments organic in origin.") The similarities between this case and *Williams* are too strong to ignore, and the TCCA "decided [the] case differently than . . . [the Supreme Court] has on a set of materially indistinguishable facts." *Williams*, 529 U.S. at 406. The TCCA's decision was therefore contrary to clearly established federal law and Jennings has established prejudice.

c. *Penry*

Jennings also argues that evidence of his low intelligence would have entitled him to state habeas relief after the Supreme Court decided *Penry v. Johnson*, 532 U.S. 782 (2001). Because Jennings never raised this claim based on this evidence in state court, it is unexhausted and procedurally defaulted.[6] *See* 28 U.S.C. § 2254(b)(1); *Orman v. Cain*, 228 F.3d 616, 619-20 (5th Cir. 2000); *Coleman v. Thompson*, 501 U.S. 722, 735 n.1 (1991).

III. Order

1. Jennings's Petition (Docket Entry 1) is Granted;

2. Thaler's Motion for Summary Judgment (Docket Entry 6) is Denied;

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[6] Jennings raised a *Penry* claim in state court but limited it to the evidence he presented at trial. That was insufficient to exhaust the claim. *See Jones v. Jones*, 163 F.3d 285, 298 (5th Cir. 1998); *Knox v. Butler*, 884 F.2d 849, 852 n.7 (5th Cir. 1989).

3. Thaler shall release Jennings from custody unless, within 120 days, the State of Texas grants Jennings a new sentencing hearing or resentences him to a term of imprisonment as provided by Texas law at the time of Jennings's crime; and

4. This Order is stayed until all post-judgment motions and appeals are final or the time to file such motions and appeals expires.

So Ordered

Lynn N. Hughes
United States District Judge

Houston, Texas
April 25, 2012

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

ROBERT MITCHELL JENNINGS,	§	
	§	
Petitioner,	§	
	§	
v.	§	H-09-219
	§	
RICK THALER, Director,	§	
Texas Department of Criminal	§	
Justice-Correctional Institutions Division,	§	
	§	
Respondent.	§	

FINAL JUDGMENT

Jennings's Petition for a writ of Habeas Corpus (Docket Entry 1) is Granted. Thaler shall release Jennings from custody unless, within 120 days, the State of Texas grants Jennings a new sentencing hearing or resentences him to a term of imprisonment as provided by Texas law at the time of Jennings's crime. Thaler's Motion for Summary Judgment (Docket Entry 6) is Denied.

Lynn N. Hughes
United States District Judge

Houston, Texas
April 23, 2012

Not Reported in S.W.3d, 2008 WL 5049911 (Tex.Crim.App.)
(Cite as: 2008 WL 5049911 (Tex.Crim.App.))

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Only the Westlaw citation is currently available.

UNDER TX R RAP RULE 77.3, UNPUBLISHED OPINIONS MAY NOT BE CITED AS AUTHORITY.

*OPINION*Do Not Publish

Court of Criminal Appeals of Texas.
Ex parte Robert Mitchell JENNINGS, Applicant.

Nos. AP-75806, AP-75807.
Nov. 26, 2008.

Background: Application for writ of habeas corpus was forwarded from the 208th District Court, Harris County.

Holding: The Court of Criminal Appeals, Price, J., held that petitioner was not denied effective assistance of counsel.

Relief denied.

Keller, P.J., and Johnson, J., concurred in result.

Holcomb, J., dissented.

West Headnotes

[1] Criminal Law 110 ⇐1961

110 Criminal Law
110XXXI Counsel
110XXXI(C) Adequacy of Representation
110XXXI(C)2 Particular Cases and Issues
110k1958 Death Penalty
110k1961 k. Presentation of Evidence in Sentencing Phase. Most Cited Cases

Trial counsel was not deficient at punishment phase of trial for capital murder in failing to call defendant's mother and sister, who allegedly could have testified as to mitigating factors of poverty and lack of supervision in defendant's single-parent home, to his mother's drug abuse, and to defendant's difficulties in school, as element of claim of ineffective assistance of counsel. U.S.C.A. Const.Amend. 6.

[2] Criminal Law 110 ⇐1960

110 Criminal Law
110XXXI Counsel
110XXXI(C) Adequacy of Representation
110XXXI(C)2 Particular Cases and Issues
110k1958 Death Penalty
110k1960 k. Adequacy of Investigation of Mitigating Circumstances. Most Cited Cases

Trial counsel's failure to make any attempt to review state's file, that allegedly would have established brain damage as a mitigating factor, did not prejudice defendant, as element of claim of ineffective assistance of counsel in prosecution for capital murder, evidence of defendant's alleged impaired impulse control would not have influenced jury's decision with respect to deliberateness, as special punishment issue, and even had defendant presented evidence of brain damage, there was no reasonable probability that jury would have relied upon it to recommend sentence less than death. U.S.C.A. Const.Amend. 6.

[3] Sentencing and Punishment 350H ⇐1757

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(G) Proceedings
350HVIII(G)2 Evidence
350Hk1755 Admissibility
350Hk1757 k. Evidence in Mitigation in General. Most Cited Cases

Sentencing and Punishment 350H ⇐1780(3)

350H Sentencing and Punishment
350HVIII The Death Penalty

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Not Reported in S.W.3d, 2008 WL 5049911 (Tex.Crim.App.)
(Cite as: 2008 WL 5049911 (Tex.Crim.App.))

350HVIII(G) Proceedings
350HVIII(G)3 Hearing
350Hk1780 Conduct of Hearing
350Hk1780(3) k. Instructions. Most Cited Cases

Jury could give full and meaningful mitigating effect to evidence that defendant introduced at punishment phase of his trial within scope of statutory special issues, and thus, there was no Eighth Amendment deficiency in prosecution for capital murder, even though trial court gave jury nullification instruction. U.S.C.A. Const.Amend. 8.

On Application for a Writ of Habeas Corpus, In Cause No. 506814-A, From the 208th District Court of Harris County.

OPINION

PRICE, J., delivered the opinion of the Court in which MEYERS, WOMACK, KEASLER, HERVEY and COCHRAN, JJ., joined.

*1 In 1989, the applicant was convicted of capital murder and his punishment was assessed, in accordance with the jury's answers to the special issues at the punishment phase of trial, at death. On direct appeal, this Court affirmed his conviction and sentence in an unpublished opinion issued in 1993. [FN1] The applicant filed this initial application for writ of habeas corpus, brought pursuant to Article 11.071 of the Texas Code of Criminal Procedure,[FN2] in September of 1996. He filed a supplement to his initial writ application in July of 2001. Inexplicably, the writ application did not make its way up to this Court until March of 2007. In December of 2007, we filed and set his initial writ application in order to address two contentions: 1) whether his trial counsel provided ineffective assistance of counsel at the punishment phase of his trial in failing to adequately investigate mitigating evidence; and 2) whether the trial court erred in attempting to satisfy the Eighth Amendment dictates of *Penry v. Lynaugh*,[FN3] by submitting a so-called jury nullification instruction.

FN1. *Jennings v. State*, No. 70,911 (Tex.Crim.App., delivered January 20, 1993).

FN2. TEX.CODE CRIM. PROC. art. 11.071.

FN3. 492 U.S. 302, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989).

FACTS

Guilt Phase

On July 19, 1988, Houston police officer Elston Howard was in the process of arresting the clerk of an adult bookstore when the applicant entered the establishment with the intention of committing robbery. Howard was wearing a jacket with the words "Houston Police" emblazoned on the front and back. The applicant shot Howard a total of four times in the back and head, three of which shots were sufficient to cause death, and then proceeded to rob the store clerk. The applicant was later apprehended, gave a written statement in which he admitted killing Howard in the course of a robbery (but denied knowing Howard had been a police officer), and eventually directed investigators to the murder weapon.

Punishment Phase

At the punishment phase of trial, in satisfaction of its burden of proof to show a probability that the applicant "would commit criminal acts of violence that would constitute a continuing threat to society," [FN4] the State presented evidence of his criminal history. At the age of fourteen, the applicant was declared a delinquent and placed on probation. Less than two years later his probation was revoked, and he was committed to the custody of the Texas Youth Council. By the time he was seventeen, he had been convicted of aggravated robbery and sentenced to five years in the penitentiary. In 1978, at the age of twenty, he was convicted of two more aggravated robberies and a burglary and assessed concurrent thirty-year sentences. While in the penitentiary, the applicant committed thirteen disciplinary violations. Within two months of his release from the penitentiary in 1988, he began a

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spree of at least six more aggravated robberies at restaurants, nightclubs, and adult bookstores and cinemas. This crime spree culminated in Officer Howard's murder.

FN4. *See* former TEX.CODE CRIM. PROC. art. 37.071, § b(2) (now § b(1)) ("whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society[.]").

The defense called jail chaplain George Burrell. Burrell testified that he had met the applicant in the county jail shortly after the applicant was arrested for Howard's murder and had visited him two or three days a week since. He knew of no disciplinary violations that the applicant had committed while in the jail. In the brief time that Burrell had known the applicant, the applicant's demeanor had evolved from unitalkative and disconnected to "revived" and "bright." The applicant had even begun to counsel other inmates. Burrell had come across others during his jail ministry whom he regarded as "incorrigible," but did not count the applicant among them.

INEFFECTIVE ASSISTANCE OF COUNSEL

The Law

*2 There are two components to any Sixth Amendment claim of ineffective assistance of counsel.

First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense.[FN5]

FN5. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

To show prejudice, the defendant must demonstrate that, but for his counsel's deficiency, there is a reasonable probability of a different result.[FN6] "A reasonable probability is a probability sufficient to undermine confidence in the outcome." [FN7] A reviewing court need not "address both components of the inquiry if the defendant makes an insufficient showing on one." [FN8]

FN6. *Id.* at 694.

FN7. *Id.*

FN8. *Id.* at 697.

The applicant alleges that his trial attorneys performed deficiently in failing to conduct an adequate mitigation investigation, and that, had they investigated, they would have discovered significant mitigating evidence that could have been introduced at the punishment phase of his trial. With respect to counsel's duty to investigate, the Supreme Court has observed that:

> counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments.[FN9]

FN9. *Id.* at 691.

Moreover, "strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitation on investigation." [FN10]

FN10. *Id.* at 690-91.

These principles do "not require counsel to investigate every conceivable line of mitigating evidence no matter how unlikely the effort would be to assist the defendant at sentencing." [FN11] But they

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do require counsel to pursue any reasonably available line of mitigating evidence that preliminary investigation suggests may have promise.[FN12] And, because trial counsel also have a duty to investigate what they reasonably know to be likely *aggravating* evidence against their client, a claim of ineffective assistance of counsel may also be predicated upon the failure of counsel to discover significant mitigating evidence that would have come to light, however incidentally, had they satisfied their duty to adequately investigate all reasonably anticipated aggravating circumstances.[FN13]

FN11. *Wiggins v. Smith*, 539 U.S. 510, 533, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003).

FN12. *See id.* at 527 ("In assessing the reasonableness of an attorney's investigation, ... a court must consider not only the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further.").

FN13. *Rompilla v. Beard*, 545 U.S. 374, 125 S.Ct. 2456, 162 L.Ed.2d 360 (2005).

The applicant claims that, had his trial attorneys examined the district clerk's file in one of his prior aggravated-robbery cases, they would have discovered a psychological evaluation that would have led them to evidence of brain damage. He also claims that his trial attorneys were aware of other significant mitigating aspects of his life and background and should have investigated those with a view toward producing evidence at the punishment phase of his trial. We hold that, while his trial counsel may well have performed deficiently in these respects, the applicant has failed to establish a reasonable probability that, but for these deficiencies, the outcome of his punishment proceeding would have been different.

The Facts: Brain Damage?

*3 Prior to his prosecutions for aggravated robbery in 1978, the applicant underwent a court-ordered evaluation for sanity and competency to stand trial. Along the way to finding the applicant both sane and competent to stand trial, Dr. J.M. Bloom, a psychologist, observed:

> Although the results of psychological assessment techniques suggests [sic] the presence of mild mentally [sic] retardation and mild organic brain dysfunction, it is the [sic] opinion that these are not severe enough to produce the kind of deficits which [the applicant] manifested during interview. It is felt that he is attempting to present himself as a mentally ill person in order to delay proceedings.

Applicant's trial attorneys have acknowledged via affidavit that they were unaware of this report because they made no attempt to review the case files in the district clerk's office with respect to any of the applicant's prior convictions. This failure, they admit, was not the result of any particular strategy. Because of their failure to review the district clerk's files, they were "not aware of Dr. Bloom's report at the time of [the applicant's] capital murder trial." Had they been aware of the report, they "would have requested further psychological evaluation to confirm, and more fully develop, the prior diagnosis of mental retardation and organic brain dysfunction." Had that investigation panned out, they would have "argued to the jury that his diminished mental capacity made him less morally culpable for his conduct and constituted a reason to spare his life."

In an effort to meet the prejudice component of the applicant's ineffective assistance claim, habeas counsel conducted the additional psychological evaluation that he contends trial counsel should have done. A Quantified Electroencephalogram revealed dysfunction in the frontal and temporal areas of the applicant's brain. A SPECT study demonstrated the presence of frontal and left temporal lobe impairment. "These abnormal findings support the contention that the [applicant's] brain has been injured." A neuropsychological examination did not

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confirm mental retardation, but the results were "consistent with temporal and associative pathway problems." From these test results, Dr. Whadel L. Dickerson, another psychologist, concluded that "it is clear that [the applicant's] capacity for emotional control and self-inhibition is less than that of an unimpaired person and this condition has a demonstrable physical basis." "These kinds of findings are often linked," according to Dr. Dickerson, "to learning problems of a fairly subtle sort, difficulties with emotional stability and difficulty with impulsive behavior." Moreover, "[t]hese findings could have been developed" at the time of the applicant's trial "had anyone undertaken to seek them out."

In response to the applicant's claim, the State has presented a report from a forensic psychiatrist, Dr. Victor R. Scarano. Dr. Scarano challenged the diagnostic power of a Quantitative EEG to determine brain injury and asserted that a SPECT scan conducted in 1996 would reveal little about the condition of the applicant's brain at the time of the offense in 1988. Dr. Scarano concluded that these tests "do not provide any evidence that [the applicant] suffered from mental retardation, a learning disability, impulse control problems, brain damage, or organic brain dysfunction on or before" the date of the offense. He also gleaned from his review of the police offense reports that the applicant first shot Officer Howard in the back, and then, after an interval, shot him twice more in the head, execution style. Given this scenario, Dr. Scarano concluded that the applicant's killing of Howard was not, in any event, an impulsive act.

The Facts: Disadvantaged Background?

[*4] After the State rested its case at the punishment phase of trial, the applicant's trial counsel moved the court to allow the applicant to testify to his disadvantaged background without being subjected to open-ended cross-examination. He proffered:

> that if [the applicant] was sworn to testify, under oath he would testify that he was raised by a single parent in an impoverished home, impoverished community, by a mother who was addicted to drugs and who was as recent[ly] as 1988 ... arrested for drug charges at the time he was arrested for this particular offense; that he completed the Ninth Grade and was a poor student in school and whereas he had no learning difficulties, had a very difficult time in-ah-making the grade in school and participating in school and learning what was being taught there.

The trial court denied the motion, and the applicant did not testify. Trial counsel called no other witness who could have testified to these or any other mitigating factors.

The applicant now faults his trial counsel for failing to introduce evidence of his disadvantaged background from other witnesses. He contends that both his mother and his sister could have supplied the same information that he was denied the opportunity to provide in the absence of open-ended cross-examination. Lee's trial counsel's affidavit asserts that he interviewed both the applicant and his mother and learned that the applicant "was the product of a disadvantaged background, was raised by a drug-addicted mother, had a limited education, and abused alcohol." But he also admitted that, at the time of the applicant's capital murder trial, in 1989:

> I did not fully appreciate the concept of "mitigating evidence" as it related to the special issues submitted at the punishment stage. As a result, the defense did not conduct a "mitigation investigation" in an effort to discover evidence which could be offered at the punishment stage in support of a sentence less than death.

Both the applicant's mother and his younger sister provided affidavits to habeas counsel substantiating the applicant's disadvantaged background and asserting that trial counsel did not talk to them "much" about it before trial and failed to ask them to testify, which they would have been willing to do. [FN4] The applicant has not identified any *other* mitigation witnesses that his trial counsel may have

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uncovered to testify to the applicant's disadvantaged background had they conducted a full-blown mitigation investigation.

FN14. The applicant's younger sister, Carla Jennings, gave an affidavit that said:

> My name is Carla Jennings. I am 34 years old. Robert Mitchell Jennings is my brother.
>
> Our mother, Flora Jennings, became pregnant at age 16 and gave birth to Robert at age 17. She often told him over the years that he was conceived as a result of a "date rape," that he was the reason that she was unable to complete her education, and that she did not want him.
>
> Mother, who lived in Houston, sent Robert to live with her mother and grandmother on a farm in Timpson because she did not want him and could not support him. In 1962, mother got married. A couple of years later, Robert was sent to Houston to live with mother, her husband, and me.
>
> During our childhood, we had little male supervision. Father was seldom at home, and they divorced after several years. During the week, mother lived with and cared for an elderly woman. She left Robert and me at our apartment, supervised only by an older cousin. Mother came home only on the weekends. She used drugs on a regular basis.
>
> We were poor. We usually had the barest of essentials, such as food and clothing. We had little adult supervision or love.
>
> Robert had two head injuries requiring medical treatment during his childhood. Once, he was in an auto accident in which the car rolled over several times. On another occasion, I understand that he was hit in the head with a baseball bat.
>
> Robert dropped out of school in junior high. He had been in special education classes, was doing poorly, and became involved with drugs. From about age 15, he was in and out of reform school and prison. He had no stable influence to guide him when he was at home.
>
> In July of 1988, Robert was arrested and charged with capital murder. Although his lawyers talked to mother and me a couple of times, they did not ask us much about Robert's background, nor did they ask us to testify. We would have testified to the information contained in this affidavit if asked to do so.
>
> The affidavit of the applicant's mother, Flora Jennings, is almost identical to Carla's.

In 2003, the applicant's lead trial counsel executed a second affidavit, which is attached to the State's response. In it, he averred that he had made a strategic decision not to call both the applicant's mother and his sister as witnesses at the punishment phase of trial. He did not think the applicant's mother was "very sympathetic" to him. He did not think his sister would be a beneficial witness; apparently he believed that she did not have occasion to know very much about the applicant because he had been incarcerated in juvenile or adult correctional facilities for much of her lifetime.

Analysis

*5 [1] It is clear from trial counsel's proffer at the punishment phase of trial that, notwithstanding the claim in his initial affidavit that he did not "fully appreciate the concept" of mitigating evidence in 1989, he had some understanding of the importance of offering evidence of a disadvantaged background at the punishment phase of a capital

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case. Nevertheless, he has asserted in his later affidavit that his decision not to call the applicant's mother and sister was a strategic one. Was that strategic decision informed by adequate investigation? Lead trial counsel gleaned the information contained in his trial proffer from his interviews with the applicant and his mother. According to the applicant's sister, trial counsel also spoke with her. He must have been aware that they could have testified *at least* to the poverty and lack of supervision in the applicant's single-parent home, to his mother's drug abuse, and to the applicant's difficulties in school. Whether or not trial counsel were aware of all of the particulars that have now been brought out (*viz:* that the applicant was an unwanted child with little supervision and no male role model in his life who began to abuse drugs and alcohol at an early age) [FN15] is of no consequence. The applicant has not shown by a preponderance of the evidence that trial counsel did not know enough of what his mother and sister could tell the jury to make an informed strategic decision not to call them. We cannot say that trial counsel's performance was deficient in this respect.

FN15. *See* note 12, *ante*.

It is possible that trial counsel's admitted ignorance of the importance of conducting a full-blown mitigation investigation deprived the applicant of *other* witnesses who could and would have testified to the full extent of his disadvantaged background. But because the applicant now identifies no such witnesses, he has failed to prove by a preponderance of the evidence that such witnesses exist or would have been willing to testify at his trial. He has therefore failed to establish that he suffered any prejudice on this account.

[2] Whether the applicant's trial attorneys were deficient in failing to make any attempt to review the State's file is a closer question. Because evidence of prior convictions and the particulars of the underlying misconduct are routinely admitted as relevant to the future-dangerousness special issue, trial counsel had a duty to review any readily available sources of information with respect to those priors. Dr. Bloom's report was publicly available in the district clerk's file. Even if Dr. Bloom himself attributed the applicant's test results to malingering, it is arguable that his report should nevertheless have sufficed to alert competent trial counsel that further psychological evaluation would be appropriate.[FN16] Ultimately, however, we need not determine whether the applicant's trial counsel were deficient in failing (albeit by serendipity, as in *Rompilla*) to discover this avenue of mitigating evidence. In our view, even had the applicant presented his newly developed evidence of brain damage, there is no reasonable probability that the applicant's jury would have relied upon it to recommend a sentence less than death.

FN16. Moreover, from their interviews with the applicant's mother and sister, if not the applicant himself, trial counsel would or should have known about the significant head injuries the applicant suffered growing up. *See* note 12, *ante*. Knowledge of such injuries ought ordinarily to suggest to trial counsel the need for a psychological evaluation for debilitating brain damage.

[6] In assessing prejudice, a reviewing court must evaluate the totality of mitigating evidence, both that adduced at trial and that adduced during the course of the habeas proceedings.[FN17] Even if we assume that trial counsel were ineffective for failing to develop the evidence of brain damage that habeas counsel has produced, there is very little mitigating evidence from trial to combine it with in deciding whether the jury would have assessed a different verdict at the punishment phase. That the jail chaplain did not consider the applicant to be incorrigible and did not know of any trouble the applicant had gotten into during his incarceration for this offense has negligible mitigating significance beyond its obvious relevance to the future-dangerousness special issue. The question boils down, therefore, to whether there is a reasonable probability that the applicant's jury would have

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answered any of the statutory special issues, or would have answered a properly formulated *Penry* instruction, in such a way that the applicant would have received a life sentence instead of the death penalty.

FN17. *Ex parte Gonzalez*, 204 S.W.3d 391, 398 (Tex.Crim.App.2006); *Wiggins v. Smith*, *supra*, at 536; *Williams v. Taylor*, 529 U.S. 362, 397-98, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000).

The most evident mitigating significance of any damage to the applicant's frontal and temporal lobes is its debilitating effect upon his impulse control. The relevance to the former first special punishment issue ("whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that ... death ... would result") is manifest. [FN18] A brain-damaged defendant with diminished impulse control is less likely to have acted deliberately than a person with normal self-control.[FN19] The State challenges the reliability of the applicant's evidence of impaired impulse control, however, citing Dr. Scarano's affidavit. The State also argues that the evidence shows that the applicant acted in such a deliberate manner to cause Howard's death that there is no reasonable probability the jury would have been influenced by evidence of the applicant's impaired impulse control in answering the "deliberateness" special issue. Without passing upon the reliability of the applicant's evidence, we agree with the State that it would not in any event have influenced the jury's decision with respect to deliberateness.

FN18. *See* former TEX.CODE CRIM. PROC. art. 37.071, § b(1).

FN19. We have judicially construed "deliberately" to mean something more than just intent, *viz*: "a conscious decision involving a thought process which embraces more than mere will to engage in the conduct." *Martinez v. State*, 867 S.W.2d 30, 36-7 (Tex.Crim.App.1993). The applicant's jury was instructed accordingly at the punishment phase.

Three witnesses who were present in the bookstore when Howard was shot testified at the guilt phase of trial, including the clerk. According to those witnesses, Howard was standing at the counter of the bookstore filling out paperwork to effectuate the clerk's arrest when the applicant entered the front door about ten to twelve feet away. The applicant approached Howard "fast," according to the clerk. When Howard noticed the applicant, he "kind of froze" and said something like, "Oh, no," or "Stop." There were two shots, after which Howard "struggled" past the applicant toward the door. Before he could get out the door, however, Howard collapsed face-down, moaning. The applicant took several long strides toward Howard, and then pointed his gun down at Howard's head, firing twice more. In all, Howard suffered four gunshot wounds: two to his upper back and shoulder area and two to the head. Both of the back wounds and one of the head wounds would by themselves have proven fatal, according to the medical examiner. The interval between the first two shots and the last two shots was, by best estimates, at least "two to three seconds." Howard never had a chance to draw his weapon, which was found still holstered.

[*7] There was obviously nothing impulsive about the applicant's decision to rob the clerk of the bookstore, coming as it did at the end of a robbery spree that even included one incident earlier that same evening. But the applicant had never shot anyone before and apparently chose the establishments he would rob with a view toward minimizing any potential for collateral damage. It is possible that a jury would find that the applicant was surprised when he unexpectedly encountered a police officer and fired the first two shots without reflection, on impulse. But we do not think there is a reasonable probability that a jury would fail to find that the *second* two shots were deliberate-that is to

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say, that they were the product of "more than mere will to engage in the conduct." [FN20] However impulsive it may have been for the applicant to shoot Howard at the outset, his conduct in striding the ten to twelve feet to where Howard subsequently collapsed and targeting his head seems to be an unmistakably deliberate act of murder.

FN20. *Id.*

It is possible that the applicant's jury could have regarded whatever impaired impulse control they might have found him to suffer from on account of possible brain damage to have mitigating significance beyond its tendency to negate the deliberateness special issue. Even a concededly deliberate act might be perpetrated more readily by an actor with such brain damage, the jury might reasonably believe, than by a normal person. A rational juror might even believe that an individual growing up with frontal and/or temporal lobe damage has endured a generally more disadvantaged life than one who suffered no such disability. On these bases, a jury exercising its normative function to decide whether mitigating circumstances warrant the imposition of a life sentence on a death-eligible defendant could reasonably enter the fact of the applicant's brain damage and consequent diminished impulse control on the "life" side of the ledger. Put in the instant case, the applicant's brain damage would constitute practically the *only* circumstance to be entered on the side of life; there is precious little other evidence of mitigating value to counteract the substantial, non-statutory aggravating circumstances in this case.[FN21] We conclude that there is not a reasonable [illegible]ability-a probability sufficient to undermine [illegible]ence-that the applicant's jury, taking Chaplain Burrell's meager testimony at trial together with the evidence developed during the habeas corpus proceedings of the applicant's possible brain damage and consequent lack of impulse control, would have found sufficient mitigating facts to warrant the imposition of a life sentence.[FN22]

FN21. *See Martinez v. Quarterman*, 481 F.3d 249, 258 (5th Cir.2007), *cert. denied*, — U.S. —, 128 S.Ct. 1072, 169 L.Ed.2d 816 (2008) (reviewing court's job in assessing prejudice from failure to conduct adequate mitigation investigation is to determine whether there is a reasonable probability a jury would find that the balance of aggravating and mitigating considerations did not warrant death); *Ex parte Gonzalez*, *supra*, at 398 (reviewing court evaluates "the evidence in aggravation and the available mitigating evidence, in order to determine how a jury might reasonably answer the mitigation special issue").

FN22. *E.g.*, *Martinez v. Quarterman*, *supra*; *Sonnier v. Quarterman*, 476 F.3d 349,358-60 (5th Cir.), *cert. denied*, 128 S.Ct. 374 (2007); *Keith v. Mitchell*, 455 F.3d 662, 670 (6th Cir.2006), *cert. denied*, 549 U.S. 1308, 127 S.Ct. 1881, 167 L.Ed.2d 369 (2007). *See also Woodford v. Visciotti*, 357 U.S. 19, 25-27 (2002) (California state-court judgment that trial counsel's deficiency in failing to discover evidence of brain damage and family dysfunction was not prejudicial could not be said to be objectively unreasonable for purposes of the Antiterrorism and Effective Death Penalty Act).

***PENRY* ERROR?**

[3] The Supreme Court's first *Penry* opinion was issued between the time that the applicant's jury was selected and the time that it was sworn in at the inception of the guilt phase of his trial.[FN23] The applicant's trial counsel requested that the trial court submit an instruction to the jury that would have authorized it to give effect to his mitigating evidence by answering one of the statutory special issues in such a way that a life sentence would be imposed-a jury nullification instruction.[FN24] The trial court granted the applicant's request and instructed the jury accordingly. Of course, the Supreme Court later held that such an instruction

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would not suffice to cure the Eighth Amendment problem.[FN23] We need not decide whether the applicant waived or invited any *Penry* error by requesting the nullification instruction.[FN24] We conclude that the jury could give full and meaningful mitigating effect to the evidence that the applicant introduced at the punishment phase of his trial within the scope of the statutory special issues. Under these circumstances, there is no Eighth Amendment deficiency.

FN23. *Penry v. Lynaugh*, 492 U.S. 302, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989). Voir dire concluded on June 12, 1989. The Supreme Court issued its opinion in *Penry* two weeks later, on June 26th, and the guilt phase of trial commenced on July 5th.

FN24. Trial counsel's proposed instruction read:

> When you deliberate about the questions posed in the Special Issues, you are to consider mitigating ... circumstances and factors, if any, supported by the evidence presented in both phases of trial. A mitigating circumstance may be any aspect of the Defendant's character and record or circumstances of the crime which you believe makes a sentence of death inappropriate in this case. If you find that there are any mitigating circumstances, you must decide how much weight they deserve and give them effect when you answer the Special Issues. If you determine that, in consideration of this evidence, that a life sentence rather than a death sentence, is an appropriate response to the personal moral culpability of the Defendant, you are instructed to answer the Special Issue under consideration "No."

FN25. *Penry v. Johnson*, 532 U.S. 782, 121 S.Ct. 1910, 150 L.Ed.2d 9 (2001).

FN26. *See Ex parte Moreno*, 245 S.W.3d 419, 430-31 & n. 42 (Tex.Crim.App.2008) (request for jury nullification instruction was sufficient to alert trial court to *Penry* problem and thus preserve error; the applicant did not "invite" *Penry* error by requesting a flawed curative instruction-at least not when trial court did not *grant* the applicant's request).

*8 The applicant's *Penry* claim is limited to the evidence actually adduced at his trial, and does not include the jury's ability to render a reasoned moral response to mitigating evidence he now claims *should* have been adduced.[FN27] The only mitigating evidence presented at trial was Chaplain Burrell's testimony with respect to the applicant's behavior and demeanor in the jail. Apart from its ameliorating relevance with respect to the future-dangerousness special issue, however, this evidence had, at best, only the most "tenuous connection ... to the defendant's moral culpability." [FN28] That being the case, the Eighth Amendment does not require a new punishment proceeding.[FN29]

FN27. *See Ex parte Kunkle*, 852 S.W.2d 499, 504 (Tex.Crim.App.1993) ("we shall not consider mitigating evidence not presented or proffered at trial in determining the merits of" a *Penry* claim); *Miniel v. Cockrell*, 339 F.3d 331, 338 (5th Cir.2003) (*Penry* claim cannot be predicated on evidence not presented at trial).

FN28. *See Abdul-Kabir v. Quarterman*, 550 U.S. 233, 127 S.Ct. 1654, 1668 n. 14, 167 L.Ed.2d 585 (2007) ("special instruction is not required when mitigating evidence has only a tenuous connection-' *some* arguable relevance'-to the defendant's moral culpability.").

FN29. *Smith v. Quarterman*, 515 F.3d 392, 414 (5th Cir.2008) (testimony that petitioner was "calm and respectful," "non-violent," and "not a drug-user" had

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> only "tenuous connection" to his moral culpability, and therefore did not require special mitigation instruction under the Eighth Amendment, consistent with *Abdul-Kabir*). *See also Franklin v. Lynaugh*, 487 U.S. 164, 177-78, 108 S.Ct. 2320, 101 L.Ed.2d 155 (1988) (plurality opinion) (future-dangerousness special issue sufficient to accommodate "any mitigating impulse that petitioner's prison record might have suggested to the jury as they proceeded with their task").

Relief is denied.

KELLER, P.J., and JOHNSON, J., concurred in the result.
HOLCOMB, J., dissented.

Tex.Crim.App.,2008.
Ex parte Jennings
Not Reported in S.W.3d, 2008 WL 5049911 (Tex.Crim.App.)

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Time: _____
Harris County, Texas
By _____ Deputy

CAUSE NO. 506814-A

EX PARTE	§	IN THE 208TH DISTRICT COURT
	§	OF
ROBERT MITCHELL JENNINGS, Applicant	§	HARRIS COUNTY, TEXAS

RESPONDENT'S AMENDED PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

The Court, having considered the applicant's original and supplemental applications for writ of habeas corpus and exhibits; the Respondent's Original and Supplemental Answers and exhibits; and, official court documents and records in cause numbers 506814 and 506814-A, makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. The Court finds that Robert Mitchell Jennings, the applicant, was indicted for the July 19, 1988 capital murder of Houston Police Department officer Elston Howard in cause number 506814 on October 4, 1988 (Tr. I - 10).

2. The Court finds that a jury found the applicant guilty of the felony offense of capital murder, cause number 506814, in the 208th District Court of Harris County, Texas, on July 11, 1989 (Tr. IA - 469).

3. The Court finds that, after the jury affirmatively answered the special issues, the court assessed punishment at death by lethal injection on July 13, 1989 (Tr. IA – 487-9).

4. The Court finds that Connie Williams and Grant Hardeway represented the applicant at trial.

5. The Court finds that the Court of Criminal Appeals affirmed the applicant's capital murder conviction in an unpublished opinion on January 19, 1993. *Jennings v. State*, No. 70,911 (Tex. Crim. App. Jan. 19, 1993).

6. The Court finds that the United States Supreme Court denied the applicant's

petition for writ of certiorari on October 4, 1993. *Jennings v. Texas*, 510 U.S. 830 (1993).

7. The Court finds that the applicant filed his original application for writ of habeas corpus, cause number 506814-A, on September 20, 1996.

8. The Court finds that, on July 16, 2001, the applicant filed a supplement to his post-conviction application for writ of habeas corpus, cause number 506814-A, contending in a third ground for relief that the trial court's submission of a nullification instruction violated the applicant's constitutional rights.

9. The Court finds that Respondent filed original and supplemental answers responding to the allegations set forth in the applicant's original and supplemental habeas petitions in cause number 506814-A.

First Ground: Disclosure of 1978 Psychological Report

1978 PSYCHOLOGICAL REPORT WAS PUBLIC DOCUMENT

10. The Court finds, based upon the assertion of habeas counsel, that the applicant has abandoned his first ground for relief alleging that the State filed to disclose to the defense the 1978 psychological evaluation report of J.M. Bloom, Ph.D.

Second Ground – Effectiveness of Trial Representation:

EVIDENCE OF MENTAL IMPAIRMENT

11. The Court finds that J.M. Bloom, Ph.D., conducted a psychological evaluation of the applicant in 1978, pursuant to the order of the 230th District Court of Harris County, Texas in cause no. 278204, and found that the applicant was attempting to present himself as a mentally ill person in order to delay proceedings; that, while psychological assessment techniques suggested the presence of mild mental retardation (85 IQ on Ammons test) and mild organic brain dysfunction, the results were not severe enough to produce the kind of deficits that the applicant manifested during Bloom's psychological interview of the applicant; and, that the applicant was malingering a mental disease or defect. *Respondent's Exhibit A, 1978 psychological evaluations of J.M. Bloom, Ph.D.*

12. The Court finds that John Nottingham, M.D., evaluated the applicant for competency in 1978 and found that the applicant was intentionally evasive, withheld information, and attempted to appear mentally disturbed on a voluntary basis. *Respondent's Exhibit B, 1978 psychiatric report of John D. Nottingham, M.D.*

13. The Court finds that Jerome Brown, Ph.D., conducted competency and sanity evaluations of the applicant in 1989 and concluded that the applicant was free of significant mental illness or defect. *Respondent's Exhibit C, 1989 psychological reports of Jerome Brown, Ph.D.*

14. The Court finds that Windel Dickerson, Ph.D., prepared conclusions and findings regarding the applicant in 1996, stating that a 1996 QEEG evaluation indicated dysfunction in both temporal and frontal areas; that a single photon emissions tomograph study demonstrated the presence of left temporal lobe impairment; that a neuropsychological examination revealed difficulties in the processing of information consistent with temporal and associative pathway problems; that a neuropsychological examination did not confirm the presence of mental retardation; that the applicant suffered from periods where impulsive action overcame the capacity for reason and foresightful action; and, that the applicant's capacity for emotional control and self-inhibition was less than that of an unimpaired person. *Applicant's writ, Exhibits D, E, and F, reports of Windel Dickerson, Ph.D., Meyer Proler, M.D., and Theodore Simon, M.D.*

15. The Court further finds that, in 2002, Victor Scarano, M.D., reviewed the instant police offense report, including the applicant's statement and witness statements; the psychiatric and psychological reports of Drs. Bloom, Nottingham, and Brown; the medical reports and opinion letters submitted with the applicant's habeas petition, including the reports of Windel Dickerson, Ph.D., Meyer Proler, M.D., and Theodore Simon, M.D.; and the applicant's school and prison records, reaching the following conclusions regarding the applicant:

- the applicant was malingering a mental disease or disorder in his 1978 interactions with Drs. Bloom and Nottingham;

- the applicant did not suffer from mental retardation or organic brain dysfunction during his 1978 interactions with Drs. Bloom and Nottingham;

- the applicant was not mentally retarded or suffering from organic brain dysfunction at the time of the instant offense;

- the instant offense was a controlled and deliberate act and not one that was committed impulsively; and

- the 1996 SPECT scan and Quantitative EEG did not provide credible evidence that the applicant suffered from mental retardation, a learning disability, impulse control problems, brain damage, or organic brain dysfunction on or before the date of the instant offense.

Respondent's Ex. N, 2002 report of Victor Scarano, M.D.

16. The Court finds that Dr. Dickerson's conclusions and findings regarding the applicant are unpersuasive in light of the 1989 competency and sanity evaluations of Jerome Brown, Ph.D., concluding that the applicant was free of significant mental illness or defect. *Respondent's Exhibit C, 1989 psychological reports of Jerome Brown, Ph.D.*

17. The Court further finds unpersuasive Dr. Dickerson's conclusions and findings regarding the applicant, based upon the 2002 report of Victor Scarano, M.D., and the following evidence:

- the 1978 pre-sentence investigation report in cause numbers 279748, 279760, and 279204 stating that the applicant obtained his G.E.D while incarcerated in the Texas Department of Corrections; that the applicant enrolled in Brazoeport Junior College in 1977 and obtained over 40 semester hours; and, that the applicant's mother and a family friend described the applicant as "intelligent." *Respondent's Exhibit D, 1978 pre-sentence investigation report;*

- the applicant's testimony during a pretrial motions hearing in the instant capital murder trial that he finished ninth grade; that he could read and write; that he had worked loading trucks for the newspaper; that he worked as a fry cook in a restaurant; and, that he passed a test to become a certified butcher while imprisoned (S.F. XXXI - 525, 527, 536);

- the defenses' statement during a hearing on the applicant's motion to restrict his cross-examination by the State at punishment that defense counsel were aware of the applicant's potential testimony that he was a

poor student, but the applicant had no learning difficulties (S.F. XXXIX 197);

- the 1989 evaluation of the applicant by a Texas Department of Corrections ("TDC") psychologist, that the applicant had no history of mental health problems; that the applicant voiced no psychological complaints; that the applicant was neat, clean, and alert, displayed adequate short and long term memory and appropriate affect; that there was no evidence of a thought disorder and the applicant's thinking was linear and goal directed; and, that a brief Psychiatric Rating Scale was within normal limits. *Respondent's Exhibit E, 1989 TDCJ-ID clinic notes;*

- the 1990 TDC social summary report reflecting that the applicant completed thirty-two hours of college credit; that the applicant was a licensed barber and certified butcher; that the applicant quit school in ninth grade because of criminal mischief; that the applicant completed a 240 hour boiler operator's training course while imprisoned; that the applicant's appearance, psychomotor activity and behavior were normal; that the applicant was alert and fully oriented; that the applicant's mood was normal; that the applicant's thinking process and thought content were clear; and, that the applicant possessed a good memory. *Respondent's Exhibit F, TDCJ-ID 1990 social summary;*

- the applicant's completion of forty-two hours of barber school in 1985 and accumulation of 1500 hours of barbering class in 1977 and 1978 while imprisoned. *Respondent's Exhibit L, Windham School District records;*

- the applicant's completion of his GED while imprisoned and obtaining the following grades in college courses: an "A" in Basic English and Personal Health, a "B" in Business Math, and a "C" in Personal Finance and Fundamentals of Math I. *Respondent's Exhibit M, Brazosport College records.*

Respondent's Ex. N, 2002 report of Victor Scarano, M.D.

18. The Court finds that the applicant fails to demonstrate that he suffers from mental retardation or organic brain dysfunction.

19. The Court finds that defense counsel Connie Williams and Grant Hardeway were not aware of Dr. Bloom's 1978 psychological evaluation report concerning the applicant. *Applicant's writ, Exhibits A and B, 1996 affidavits of Connie Williams and Grant Hardeway.*

20. The Court further finds, however, that there was nothing about the applicant indicating to defense counsel that the applicant suffered from mental illness or retardation; that the applicant appeared to understand the court proceedings; and, that the applicant

asked appropriate questions regarding what was occurring throughout his capital murder trial. *Respondent's Exhibit O, 2003 affidavit of Connie Williams.*

21. The Court finds that the primary offense and the applicant's prior criminal actions reflect a pattern of planned criminal activity that was not the result of impulse, based upon the applicant's recorded statement to police stating the following: that the applicant was released from prison in May, 1988; that the applicant and co-defendant David Harvell committed their first robbery in June, 1988; that the applicant and Harvell agreed to split the proceeds from their robberies equally; that the applicant and Harvell took turns carrying a pistol; that the applicant and Harvell routinely used a .38 chrome pistol in their robberies; that the applicant normally just took money when he robbed an adult bookstore; that sometimes the applicant took the movies from the adult bookstore and sold them to other video arcades; that the applicant usually did not take loose change, just rolled coins and bills; that the applicant committed approximately ten robberies after his release from prison in May, 1988, until the instant offense in mid-July, 1988; that the applicant robbed either bookstores or video arcades; that it was easier to rob video arcades because they were dark and seedy without many people present; that the applicant usually took the money from the wallets of the persons inside the establishment that he was robbing; and, that the applicant expected the instant offense to be "the same old routine, like it had been going real easy, real easy, no problems." *Respondent's Exhibit G, transcript of 1988 police interview.*

PRESENTATION OF BACKGROUND EVIDENCE AT PUNISHMENT

22. The Court finds that, in preparing for the instant trial, defense counsel talked to the applicant regarding the instant offense, his background, and potential witnesses. *Respondent's Exhibit O, 2003 affidavit of Connie Williams.*

23. The Court finds that defense counsel interviewed the applicant's mother in preparation for the punishment phase of the applicant's capital murder trial. *Applicant's writ, Exhibit A, 1996 affidavit of Connie Williams.*

24. The Court finds that defense counsel were aware of potential background evidence concerning the applicant, including evidence that the applicant was raised by a single parent in an impoverished home and community; that the applicant's mother was addicted to drugs and arrested on drug charges; that the applicant completed the ninth grade; that the applicant was a poor student; that the applicant was intoxicated and could not commit a deliberate action with respect to the instant offense; that the applicant saw his father on two or three occasions; that the applicant was often left alone to fend for himself; and, that the applicant's mother was convicted for theft (S.F. XXXIX 197-199).

25. The Court finds that, while defense counsel investigated and were aware of the applicant's potential background evidence, defense counsel elected, as a matter of trial strategy, to not present the testimony of the applicant's mother and sister at the punishment phase of trial because neither witnesses' testimony would benefit the applicant. *Respondent's Exhibit O, 2003 affidavit of Connie Williams.*

26. The Court finds that defense counsels' trial strategy decision to not present the testimony of the applicant's mother and sister at the punishment phase of trial was reasonable based upon the following:

- that defense counsel perceived that the applicant's mother was not sympathetic to the applicant. *Respondent's Exhibit O, 2003 affidavit of Connie Williams;*
- that the applicant's sister, Carla Jennings, was five to six years younger than the applicant who had spent much of his time in juvenile facilities or prison. *Respondent's Exhibit O, 2003 affidavit of Connie Williams;*
- that the applicant's sister, Carla Jennings, took the applicant to the hospital after he was shot following the instant offense. *State's Exhibit 19, July 22,*

1988 statement of Robert Mitchell Jennings and Respondent's Exhibit H, July 20, 1988 statement of Carla Jennings;

- that the applicant's girlfriend gave statements to police that the applicant's mother, Flora Jennings, who smoked cocaine and had a habit, took a wallet containing money that the applicant obtained from his robbery of the bookstore clerk the night of the instant offense; *Respondent's Exhibits I and J, July 21, 1988 statements of Wanda Taylor;*

- that the applicant's girlfriend speculated in a statement to the police that the applicant's mother went to the Third Ward to buy cocaine after visiting the applicant at the hospital. *Respondent's Exhibits I and J, July 21, 1988 statements of Wanda Taylor;*

- that the applicant's mother, Flora Jennings, appeared high and admitted smoking a cocaine laced marijuana cigarette earlier in the day when she was in the Houston Police Department Homicide Office giving a statement regarding the instant offense; that the applicant's mother allowed a police officer to look in her purse where he found a controlled substance; and, that the applicant's mother was then arrested and booked into the city jail. *Respondent's Exhibit K, excerpt from Houston Police Department offense report;*

- that the applicant asserted in his recorded statement to the police, that he gave his sister and mother money that he obtained from his numerous robberies. *Respondent's Exhibit G, transcript of 1988 police interview;*

- that the applicant's mother and sister related for purposes of a 1978 presentence investigation report that the applicant was very moody and tended to withdraw; that the applicant was mixed up; that the applicant was constantly truant from school and in trouble with the law as a juvenile; and, that, while denying knowledge of drug usage, the applicant's mother and sister observed strange or unusual behavior by the applicant. *Respondent's Exhibit D, 1978 pre-sentence investigation report.*

27. The Court finds that the defense presented evidence at punishment through witness George Burrell, a staff chaplain for the Harris County Sheriff's Department, that Burrell knew of no disciplinary violations by the applicant while incarcerated; that the applicant had changed; and, that the applicant was an asset as a counselor to other jail inmates (S.F. XXXIX – 185-190).

REOPEN VOIR DIRE

28. The Court finds that the applicant alleges in his state habeas application that defense counsel were ineffective because counsel neither moved to reopen voir dire to

qualify jurors on their ability to consider a *Penry* instruction nor did counsel move for a mistrial before testimony began in the guilt/innocence phase of trial. *Applicant's writ at 21.*

29. The Court finds that the United States Supreme Court issued its opinion in *Penry v. Lynaugh*, 492 U.S. 302 (1989)(*Penry I*), on June 26, 1989.

30. The Court further finds that voir dire commenced on March 20, 1989, and concluded on June 14, 1989, in the instant cause. Jurors were sworn with testimony commencing for the guilt/innocence phase of trial on July 5, 1989, and concluding on July 10, 1989.

31. The Court finds that, during voir dire, defense counsel questioned veniresperons on their ability to consider mitigating evidence, such as a defendant's age, lack of structure, economic background, psychiatric make-up, and deprivations of food, training, and parental guidance in answering the second special issue (S.F. IV - 313-314; V - 482-483; VI - 807-809, 815-818; VII - 919-921, 940-942; X - 1626-1628; XIV - 2514-2516; XV - 2616-2619; XVIII - 3228-3231; XXIII - 4462-4464; XXVI - 5210-5212, 5373-5377; XXVII - 5621-5622; XXVIII - 5936-5940).

32. The Court further finds that, on July 12, 1989, the second day of the punishment phase, the defense motioned for a mistrial, asserting that *Penry* was decided after voir dire in the instant case and the defense had no opportunity to question jurors on their ability to use a reasoned moral response in assessing the death penalty. The trial court denied the defense's motion for mistrial (S.F. XXXIX - 69-70).

33. The Court finds that, upon motion by the defense, the following instruction on mitigation was submitted to the jury in the punishment charge:

> When you deliberate about the questions posed in the Special Issues, you are to consider mitigating factors – mitigating circumstances and factors, if any, supported by the evidence presented in both phases of the trial. A mitigating circumstance may be any aspect of the Defendant's character and record or circumstances of the crime which you believe makes a sentence of death

> inappropriate in this case. If you find there are any mitigating circumstances, you must decide how much weight they deserve and give them effect when you answer the Special Issues. If you determine, in consideration of this evidence, that a life sentence, rather than a death sentence, is an appropriate response to the personal moral culpability of the Defendant, you are instructed to answer the Special Issue under consideration "No."

(S.F. XXXIX - 195-196).

34. The Court finds that the trial court denied the defense's motion to include an instruction in the punishment charge that evidence of the applicant's alcohol abuse was a mitigating fact as to punishment and that the jury was to consider such mitigating evidence (S.F. XXXIX - 201).

35. The Court finds that the State made the following statement regarding the instruction on mitigation during punishment argument:

> Let me talk to you briefly about the Charge, even though you're absolutely convinced that you're thoroughly familiar with the issues, but I want to connect it, if you will, with the evidence that you heard. The Court instructs you in a manner that you haven't heard before in the voir dire examination but it's not all that different from the principles involved and basically that instruction given to you boils down to this: If you determine in consideration of this evidence that a life sentence rather than a death sentence is an appropriate response to the personal moral culpability of the Defendant, you're instructed to answer the Special Issue under consideration "No."
>
> Now all that legalese simply says if you think it doesn't feel right in your own heart and mind as to answer those questions "Yes" because this man will be assessed death for what he did, then you shall answer it "No." Can't be any simpler than that, okay?

(S.F. XXXIX - 219-220).

36. The Court finds that defense counsel, in arguing for a life sentence at punishment, asked the jury to consider the applicant's mitigating evidence, including the following: that the applicant told the police about David Harvell, confessed to other robberies, and lead the police to evidence; that the applicant confessed to the instant offense; that the applicant did not hide evidence from the police; that the applicant did not ask for

forgiveness; that the applicant was well-behaved in prison; that the applicant began asking society for help as a child; and, that the applicant cried during his taped confession (S.F. XXXIX – 228-232, 239-242).

37. The Court finds that defense counsel Connie Williams states in his 1996 affidavit that he became aware of the decision in *Penry* during the punishment phase of trial; that the defense moved for a mistrial because the jury was not qualified under *Penry* during the State's case-in-chief at punishment; and, that the defense would have asked the court to reopen voir dire and/or moved for a mistrial had the defense known of *Penry* before the commencement of testimony. *Applicant's writ, Exhibit A, 1996 affidavit of Connie Williams.*

38. The Court finds that defense counsel were aware of the concept of mitigating evidence as it related to the special issues during the instant trial.

39. The Court further finds that jurors were qualified on their ability to consider mitigating evidence in answering the special issues.

.40. Further, the Court finds that the applicant fails to demonstrate that the jury was confused or unable to follow the court's instructions contained within the court's punishment charge, including the court's supplemental nullification instruction.

PUNISHMENT ARGUMENT

41. The Court finds that defense counsel Hardeway argued at punishment that the applicant started asking society for help when he was a boy; that the applicant did not deliberately kill the complainant because he did not know whether the complainant was dead or alive; that a person acts deliberately when he knows the result of his action; that the applicant cried during his taped confession because he was hurt and needed help; that the jury had the opportunity to help the applicant; that compassionate jurors should consider the second special issue; that the jury had the chance to give the applicant life;

that the jury could not change history; and, that killing the applicant would not correct any wrongs (S.F. XXXIX - 228-232).

42. The Court finds that defense counsel Williams argued at punishment that the killing of the complainant was not deliberate; that the applicant told the police everything that happened; that the applicant told the police about David Harvell, confessed to other robberies, and led the police to evidence; that, because of the applicant's voluntary statements to the police, the applicant might bring about his own death; that the applicant said that he deserved to die in his taped confession; that the applicant did not hide any evidence from the police; that the applicant did not ask for forgiveness; that the jury should find mitigating circumstances; that the chaplain who testified for the defense at punishment had known many inmates and thought that the applicant was not a bad inmate; that the chaplain believed in the death penalty and had never testified before; that the chaplain knew of no violations by the applicant while in jail; and, that the State would only have the testimony of an eyewitness without the evidence supplied by the applicant (S.F. XXXIX - 239-242).

43. The Court further finds that defense counsel Williams argued the following at punishment:

> I ask you to take all those facts, folks, from that case and all the other facts that you have before you in evidence and apply them to the Questions. Don't kill the man about what happened on July 19th per se. If you do that, there's no reason even – to even have a Punishment Hearing and there's no reason to even have the three Questions.
>
> You apply those facts to all the Questions that you have to answer and apply all the evidence that you know about Mr. Jennings since the offense occurred. He asked you to punish him. He deserves to be punished. But, by his own mouth, by his own hand, he causes his death. God knows where we would be if he never had that pistol and never knew about Harvell and never knew about the five other robberies. We'd be sitting here relying on the testimony of Larry Overholt and nothing else.
>
> So, let me ask you for him. If you can, if you can see some way – maybe you can't, folks. Like I told you before, I can't quarrel with that. Shoot, I'm a citizen here just like all of you. I live here, I work here, I'm raising my

> children here just like you. But if you can, I ask you to find that mitigation, to answer one of those issues "No"

(S.F. XXXIX - 239-240).

44. The Court finds that defense counsels' punishment arguments, including the arguments set forth in *Findings of Fact 41 through 43*, constituted plausible trial strategy. *Ex parte Ewing*, 570 S.W.2d 941 (Tex. Crim. App. 1978)(trial strategy will be reviewed by appellate courts only if record demonstrates the action was without any plausible basis).

THIRD GROUND – NULLIFICATION INSTRUCTION

45. The Court finds that, at the punishment phase of trial, the defense elicited testimony from a jail chaplain that he had known the applicant for a year; that the applicant had changed; and, that the applicant helped counsel other inmates at the Harris County Jail (S.F. XXIX – 185-190).

46. The Court finds that, according to the applicant's July 22, 1988 statement to police which was admitted in its entirety at the punishment phase of trial, the applicant was drinking prior to the commission of the instant offense (S.F. XXXIX – 5; *State's Ex. 19).*

47. The Court finds that the trial court submitted the following special issues to the jury in its punishment charge:

> 1. Was the conduct of the defendant, Robert Mitchell Jennings, that caused the death of the deceased committed deliberately and with the unreasonable expectation that the death of the deceased or another would result?
>
> 2. Is there a probability that the defendant, Robert Mitchell Jennings, would commit criminal acts of violence that would constitute a continuing threat to society?
>
> 3. Was the conduct of the defendant, Robert Mitchell Jennings, in killing the deceased unreasonable in response to the provocation, if any, by the deceased?

(Tr. IA – 480-2).

48. The Court finds that the trial court granted the defense's request to include the following instruction in its punishment charge to the jury:

> When you deliberate about the questions posed in the special issues, you are to consider mitigating circumstances, if any, supported by the evidence presented in both phases of the trial. A mitigating circumstance may be any aspect of the defendant's character and record or circumstances of the crime which you believe makes a sentence of death inappropriate in this case. If you find there are any mitigating circumstances, you must decide how much weight they deserve and give them effect when you answer the special issues. If you determine, in consideration of this evidence, that a life sentence, rather than a death sentence, is an appropriate response to the personal moral culpability of the defendant, you are instructed to answer the special issue under consideration "No."

(Tr. I – 478; XXXIX – 195-6).

49. The Court finds that during punishment argument, defense counsel argued that the applicant was crying when he gave police a statement regarding the instant offense (S.F. XXXIX – 230).

50. The Court finds that the applicant failed to challenge the propriety of the trial court's submission of a nullification charge on direct appeal or in his original state habeas petition. *See Jennings v. State*, No. 70,911 (Tex. Crim. App. Jan. 19, 1993).

51. Alternatively, the Court finds that there was no *Penry*-type evidence before the jury in the instant capital murder trial.

52. Additionally, the Court finds that, during the applicant's capital murder trial, no evidence was presented to the jury that the applicant sustained childhood abuse or had a limited mental capacity, an inability to learn from experience or control conduct, or an untreatable mental illness.

53. The Court finds that courts have held that evidence of a capital murder defendant's good conduct while incarcerated could be considered within the scope of the special issues. *Tennard v. Dretke*, 542 U.S. 274, 285-6 (2004)("Texas courts might reasonably conclude that evidence of good conduct in jail was within the jury's effective reach via the future dangerousness special issue"); *Summers v. Dretke*, 431 F.3d 861, 882 (5th Cir. 2005)(mitigating evidence of nonviolent nature, general good character, and

ability to conform to prison life could be considered within the special issues); *Elliott v. State*, 858 S.W.2d 478, 486-7 (Tex. Crim. App. 1993)(defendant's good behavior in jail could be considered under future dangerousness special issue).

54. The Court finds that courts have held that evidence of a defendant's intoxication at the time of the offense and remorse for the offense can be considered within the scope of the special issues. *Nelson v. Dretke*, 442 F.3d 282, 285-6 (5th Cir. 2006); *West v. Johnson*, 92 F.3d 1385, 1405 (5th Cir. 1996); *Briddle v. Scott*, 63 F.3d 364, 377 (5th Cir. 1995).

55. Additionally, the Court finds that the applicant fails to demonstrate egregious harm, pursuant to *Almanza v. State*, 686 S.W.2d 157 (Tex. Crim. App. 1984), based on the applicant's instant ground for relief. *Ex parte Smith*, 185 S.W.3d 455, 484 (Tex. Crim. App. 2006)(citing *Ex parte Maldonado*, 688 S.W.2d 114, 116 (Tex. Crim. App. 1985), for proposition that unobjected to jury charge error is subject to *Almanza's* egregious harm standard on habeas).

56. The Court finds that, during voir dire, the State and defense questioned jurors regarding their ability to consider mitigating evidence, and jurors indicated that they could consider the applicant's mitigating evidence in deliberating the punishment special issues (S.F. IV – 285-7, 313-4; V – 457-9, 482-3; VI – 794, 807-9; VII – 905-6, 919-921; 940-2; VIII – 1305-8, 1338-9; X – 1600-1, 1626-8; XIV – 2499-2500, 2514-5; XV – 2601, 2616-9; XVIII – 3211-2, 3229-30; XXIII – 4441-3, 4462-3; XXVI – 5200-1, 5210-1, 5361-3, 5373-7; XXVII – 5598-5600, 5621-2; XXVIII – 5928-9, 5936-5940).

57. The Court finds that, during punishment arguments, the State did not suggest that the jury ignore the applicant's mitigation evidence (S.F. XXXIX – 217-228, 240-8).

CONCLUSIONS OF LAW

First Ground for Relief – Disclosure of 1978 Psychological Report

1. Because the applicant has abandoned his first ground for relief, such claim need not be considered in the instant or subsequent habeas proceedings.

Second Ground for Relief – Effectiveness of Trial Representation

2. The applicant fails to demonstrate deficient performance, much less harm, with respect to his allegations that defense counsel were ineffective regarding the following: failure to investigate and present Bloom's 1978 psychological report, obtain further psychological testing of the applicant, and present evidence of the applicant's alleged mental impairment at trial; failure to present evidence of the applicant's background; failure to move to reopen or move for mistrial with respect to qualifying jurors on their ability to consider a *Penry* instruction; and, failure to forcefully argue for a life sentence. *Strickland v. Washington*, 466 U.S. 668 (1984).

3. Even assuming that defense counsel failed to investigate Bloom's 1978 psychological report, the applicant fails to demonstrate that defense counsel were ineffective because Bloom concluded in his 1978 psychological report that the applicant was malingering or attempting to present himself as a mentally ill individual in order to delay court proceedings. *Strickland v. Washington*, 466 U.S. 668 (1984).

4. Because the conclusions and findings of Windel Dickerson, Ph.D., are unpersuasive, the applicant fails to demonstrate that he was denied effective representation at trial. *Strickland v. Washington*, 466 U.S. 668 (1984).

5. Because Drs. Bloom and Nottingham concluded that the applicant was attempting to malinger a mental disease or defect and Dr. Dickerson's conclusions regarding the applicant are unpersuasive, the applicant's claim of ineffective assistance of counsel at the trial level fails.

6. The applicant fails to show ineffective assistance of counsel based on trial counsels' plausible strategic decision not to present testimony of the applicant's mother and sister concerning the applicant's background at the punishment phase of trial. *Ex parte Ewing*, 570 S.W.2d 941 (Tex. Crim. App. 1978)(holding appellate court will review trial strategy only when it is without a plausible basis); *Strickland*, 466 U.S. at 689 (stating that presentation of witnesses is essentially trial strategy and within trial counsel's domain).

7. Because jurors were able to consider the applicant's mitigating evidence in answering the special issues, the applicant's claim of ineffective representation at trial fails. *Strickland v. Washington*, 466 U.S. 668 (1984).

8. Because jury argument is a matter of trial strategy and there was a plausible basis for defense counsels' punishment arguments, the applicant fails to show ineffective assistance of counsel on such basis. *Strickland v. Washington*, 466 U.S. 668 (1984).

THIRD GROUND – NULLIFICATION INSTRUCTION

9. Because the applicant requested that the trial court include the nullification instruction in its charge to the jury, the applicant has waived his supplemental third ground for relief. *Hodge v. State*, 631 S.W.2d 754, 757 (Tex. Crim. App. 1978).

10. Alternatively, because the applicant's mitigating evidence, including his alleged good behavior while incarcerated, intoxication at the time of the primary offense, and regarding the instant offense was fully encompassed by the special issues, the applicant's ground for relief is meritless.

11. Additionally, based on the applicant's failure to demonstrate harm pursuant to *Almanza*, the applicant's ground for relief is meritless.

12. Accordingly, it is recommended to the Texas Court of Criminal Appeals that relief be denied.

Cause No. 506814-A

EX PARTE	§	IN THE 208TH DISTRICT COURT
	§	OF
ROBERT MITCHELL JENNINGS, Applicant	§	HARRIS COUNTY, TEXAS

ORDER

THE CLERK IS HEREBY **ORDERED** to prepare a transcript of all papers in cause no. 506814-A and transmit same to the Court of Criminal Appeals, as provided by Article 11.071 of the Texas Code of Criminal Procedure. The transcript shall include certified copies of the following documents:

1. all of the applicant's pleadings filed in cause number 506814-A, including his application for writ of habeas corpus;

2. all of the Respondent's pleadings filed in cause number 506814-A, including the Respondent's Original Answer;

3. this court's findings of fact, conclusions of law and the order in cause number 506814-A;

4. any Proposed Findings of Fact and Conclusions of Law submitted by either the applicant or Respondent in cause no. 506814-A;

5. all affidavits and exhibits filed in cause no. 506814-A; and

7. the indictment, judgment, sentence, docket sheet, and appellate record in cause no. 506814, unless they have been previously forwarded to the Court of Criminal Appeals.

THE CLERK IS FURTHER **ORDERED** to send a copy of the court's findings of fact and conclusions of law, including its order, to applicant's counsel: Randy Schaffer; 1301 McKinney, Suite 3100; Houston, Texas 77010 and to Respondent: Lynn Hardaway; Harris County District Attorney's Office; 1201 Franklin, Suite 600; Houston, Texas 77002.

BY THE FOLLOWING SIGNATURE, THE COURT ADOPTS THE RESPONDENT'S AMENDED PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW IN CAUSE NO. 506814-A.

SIGNED this 23 day of January, 2006.

Presiding Judge
208th District Court

OPPOSITION BRIEF

~~No. 11-10809~~
~~13-7211~~

IN THE
SUPREME COURT OF THE UNITED STATES

ROBERT MITCHELL JENNINGS,
Petitioner,

v.

WILLIAM STEPHENS, Director,
Texas Department of Criminal Justice,
Institutional Division,
Respondent.

On Petition for Writ of Certiorari
To the United States Court of Appeals
For the Fifth Circuit

BRIEF IN OPPOSITION
TO PETITION FOR WRIT OF CERTIORARI

GREG ABBOTT
Attorney General of Texas

EDWARD L. MARSHALL
Chief, Criminal Appeals Division

DANIEL HODGE
First Assistant Attorney General

*TOMEE M. HEINING
Assistant Attorney General
Criminal Appeals Division
P.O. Box 12548, Capitol Station
Austin, Texas 78711
(512) 936-1600

DON CLEMMER
Deputy Attorney General
Criminal Justice

* Counsel of Record

ATTORNEYS FOR RESPONDENT

QUESTIONS PRESENTED

1. The state court reviewed Jennings's claims of ineffective assistance of trial counsel on the merits and denied relief. The Fifth Circuit held that Jennings failed to satisfy AEDPA's relitigation bar because all fairminded jurists of reason would not unanimously conclude that the state court was objectively unreasonable. Did the Fifth Circuit err in applying the undisputedly correct legal standard to Jennings's facts?

2. Did the Fifth Circuit err in concluding that Jennings waived an argument in the state court—precluding federal habeas consideration of the argument—by raising it only in a footnote of a state court pleading, thereby failing to provide the state court with a fair opportunity to consider the substance of the argument?

3. Did the Fifth Circuit err in dismissing Jennings's attempt to file a cross-point of error in his appellee's brief in opposition to the Director's appeal when he failed to first file a timely notice of appeal or motion for certificate of appealability?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF CONTENTS ..... ii,iii

TABLE OF AUTHORITIES ..... iv,v,vi

STATEMENT OF THE CASE 1

I. The Crime and Trial 1

II. The Sentencing Proceedings 2

III. The State-Court Proceedings 5

A. Jennings's habeas claims 5

B. Expert testimony in state habeas proceedings 8

C. The state habeas decision 10

IV. Disposition in the Federal District Court 12

V. Disposition in the Fifth Circuit 13

REASONS FOR DENYING THE WRIT 13

I. The Fifth Circuit Committed No Error by Reversing the District Court's Grant of Federal Habeas Relief Based Upon the Assistance of Counsel at the Punishment Phase of Trial. (Issues I and II) 14

A. Jennings suffered no prejudice from trial counsel's decision not to present potential evidence of low IQ or brain damage. (Issue I) 16

B. Trial counsel was not ineffective, and Jennings suffered no prejudice from trial counsel's decision not to present evidence of a difficult childhood. (Issue II) 23

III. The Fifth Circuit Committed No Error in Concluding Jennings Waived A Prejudice Argument Based Upon *Panry II*. (Issue III) 30

TABLE OF CONTENTS, (Continued)

Page

IV. The Fifth Circuit Committed No Error in Dismissing Jennings's Cross-Appeal. (Issue IV) 34

CONCLUSION 41

TABLE OF AUTHORITIES

Cases	Page
Abdul-Kir v. Quarterman, 550 U.S. 233 (2007)	22,31
Ainsworth v. Woodford, 268 F.3d 868 (9th Cir. 2001)	35
Atkins v. Virginia, 536 U.S. 304 (2002)	19
Bobby v. Van Zook, 558 U.S. 4 (2009)	18,27
Brewer v. Quarterman, 500 U.S. 286 (2007)	22,31
Bryant v. Scott, 28 F.3d 1411 (5th Cir. 1994)	24
Bridas SAPIC v. Gov't of Turkm., 345 F.3d 347 (5th Cir. 2003)	32
Brown v. Thaler, 684 F.3d 482 (5th Cir. 2012)	26
Chester v. Thaler, 666 f.3d 340 (5th Cir. 2011)	17
Clark v. Thaler, 673 F.3d 410 (5th Cir. 2012)	24
Cullen v. Pinholster, 131 S. Ct. 1388 (2011)	*passim*
El Paso Natural Gas Co. v. Neztsosie, 526 U.S. 473 (1999)	*passim*
Ex parte Kunkle, 852 S.W.2d 499 (Tex. Crim. App. 1993)	33,34
Franklin v. Lynaugh, 487 U.S. 164 (1988)	31
Fretwell v. Norris, 133 F.3d 621 (8th Cir. 1998)	36
Gonzales v. Thaler, 132 S. Ct. 641 (2012)	13,34,36
Grotto v. Herbert, 316 F.3d 198 (2nd Cir. 2003)	36
Hargrave v. Fibreboard Corp., 710 F.2d 1154 (5th Cir. 1983)	35
Harrington v. Richter, 131 S. Ct. 770 (2011)	*passim*

TABLE OF AUTHORITIES, (Continued)

Cases	Page
Knowles v. Mirzayance, 556 U.S. 111 (2009)	15,27
Ladd v. Cockrell, 311 F.3d 349 (5th Cir. 2002)	19
Massachusetts Mutual Life Insurance Co. v. Ludwig, 426 U.S. 479 (1976)	*passim*
Minel v. Cockrell, 339 F.3d 331 (5th Cir. 2003)	34
Mitchell v. Epps, 641 F.3d 134 (2011)	18
Pape v. Thaler, 641 F.3d 281 (5th Cir. 2011)	24
Penry v. Johnson, 532 U.S. 782 (2001) ("*Penry II*")	*passim*
Penry v. Lynaugh, 492 U.S. 302 (1989) ("*Penry I*")	*passim*
Penry v. State, 903 S.W.2d 715 (Tex. Crim. App. 1995)	33
Slack v. McDaniel, 529 U.S. 473 (2000)	35
Smith v. Texas, 550 U.S. 297 (2007)	22
Strickland v. Washington, 466 U.S. 668 (1984)	*passim*
Szabo v. Walls., 313 F.3d 392 (7th Cir. 2002)	35,36
United States v. American Ry. Exp. Co., 265 U.S. 425 (1924)	37,39
Wiggins v. Smith, 539 U.S. 510 (2003)	*passim*
Wiley v. Epps, 625 F.3d 199 (5th Cir. 2010)	36
Williams v. Cain, 125 F.3d 269 (5th Cir. 1997)	35,36
(Terry) Williams v. Taylor, 529 U.S. 362 (2000)	*passim*

TABLE OF AUTHORITIES, (Continued)

Cases **Page**

Wong v. Belmontes, 130 S. Ct. 383 (2009) 18,23,30

Woodford v. Visciotti, 537 U.S. 19 (2002) 29

Woods v. Thaler, 399 F. App'x 884 (5th Cir. 2010) 25

Constitutions, Statutes and Rules

U. S. Const., amend. VI 27

U. S. Const., amend. VIII 30,31,32

28 U.S.C. § 2253 (West 2013) 34

28 U.S.C. § 2254 (West 2013) ..... *passim*

Tex. R. App. P 38.1(i) 32

Fed. R. App. P. 28(a) 33

Sup. Ct. R. 10 (West 2011) 13

Miscellaneous

American Clinical Neurophysiology Society 8

Anti-Terrorism and Effective Death Penalty Act of 1996 ("the AEDPA") ..... *passim*

Marc Nuwer, *Assessment of Digital EEG, Quantitative EEG, and EEG Brain Mapping: Report of the American Academy of Neurology and the American Clinical Neurophysiology Society*, 49 NEUROLOGY 277, 278 (1997) ..... *passim*

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI AND MOTION FOR STAY OF EXECUTION

Petitioner Robert Mitchell Jennings was properly convicted and sentenced to death for the capital murder of Harris County police officer Elston Howard. 2 CR 469, 480, 487. Jennings now petitions this Court for a writ of certiorari, complaining that the Fifth Circuit Court of Appeals erred in reversing the district court's grant of habeas corpus relief, and in denying a certificate of appealability (COA) on an additional issue. However, Jennings is unable to present any special or important reason for certiorari review because the Fifth Circuit's decision was consistent with federal habeas jurisprudence. Certiorari review should therefore be denied.

STATEMENT OF THE CASE

I. The Crime and Trial

On July 19, 1988, around 11:20 p.m., Houston Police Officer Elston Howard entered Mr. Peeper's Bookstore to arrest the clerk for operating a pornographic video arcade without a permit. 33 RR 34-36, 52-56, 78-81, 110. Officer Howard wore a jacket bearing the words "Houston Police" on the front and back, and displaying Houston police Department badges on the shoulders. 33 RR 40-42, 79.

While Officer Howard was completing paperwork to effectuate the clerk's arrest, Jennings entered the store, went "right toward Officer Howard," and shot him twice in the head. 33 RR 113-16. Officer Howard did not have time to unholster his weapon and managed only to say "Oh, no" before Jennings shot him. 33 RR 115. Officer Howard staggered toward the front of the store and fell face down. 33 RR 117. While he lay face down and "moaning" on the floor, Jennings walked over and fired two more shots into the back of Officer Howard's head, "execution style." 33 RR 119. Jennings then stole the money from the register and from the clerk's wallet, and fled the store. 33 RR 120-21, 124. On July 22, 1988, Jennings confessed to murder in a written statement to police. 35 RR 160-68. Jennings confessed again

the following day in a tape-recorded interview. 39 RR125, 131-40; SHCR 272-303.

II. The Sentencing Proceedings

At the outset of the sentencing proceedings, lead counsel Connie "Chip" Williams assured the trial court that "the files of the State have been opened to us, *I've seen them, including all extraneous offenses*" that the State would use during sentencing. 29 RR 6-7 (emphasis added).

The State's aggravating evidence consisted of a description of Jennings's life of crime, which included a declaration of juvenile delinquency and probation in 1972, when Jennings was fifteen years old, for stealing a car; 39 RR 265; a second declaration of delinquency in 1973, and remand to the custody of the Gulf Coast Trade Center, 9 RR 266; and, in 1974, after he engaged in yet another act of "delinquent conduct," he was remanded to the Texas Youth Council, 39 RR 267.

In 1975, four months after he turned 18, Jennings committed aggravated robbery and was sentenced to five years in prison. 39 RR 271. On May 2, 1978, Jennings committed another aggravated robbery with a deadly weapon. *Id.* On May 8, 1978, Jennings entered a restaurant, pistol-whipped an employee, stole money from the cash register and safe, and then locked the restaurant's employees in a freezer. 39 RR 60-65. That same day, Jennings also committed "burglary of a habitation with intent to commit theft." 39 RR 182. For these three felonies, Jennings received a thirty-year prison sentence. 39 RR 182-83. While in prison, Jennings committed thirteen disciplinary violations. 39 RR 119-22.

Jennings was paroled on May 13, 1988. SHCR 303. He resumed armed robbery approximately two weeks later, and committed ten armed robberies in the ensuing two months. SHCR293-94.

Before trial, defense counsel completed a robust mitigation investigation. *See* CR15-16 (motion and order for court-appointed investigator); CR19-24, 46-59

(subpoenas for witnesses and documents); CR25-30 (motion for discovery); CR36-41 (motion for discovery of punishment evidence); CR145-46 (motion for a second court-appointed investigator). Defense counsel reviewed the State's file containing "all" of Jennings's "psychological records" and "sociological records" in the custody of the Texas Department of Criminal Justice ("TDCJ"), CR268; 29 RR 7. Defense counsel also interviewed multiple members of Jennings's family regarding his background.

Williams explained the results of his investigation in a factual proffer to the trial court: "[Jennings] was raised by a single parent in an impoverished home, impoverished community, by a mother who was addicted to drugs and was arrested for drug charges [in 1988]." 39 RR 197. Jennings's mother also was convicted of theft. 39 RR 199. Jennings "only saw his father two or three times," and his father "never [provided] any support to the family." 39 RR 198. "Many times, due to his mother's condition, being on drugs, [Jennings] was left alone. He was often left to fend for himself, to obtain food for feeding himself and clothing himself." 39 RR 198-99. Jennings "completed the Ninth Grade and was a poor student in school and [although] he had no learning difficulties, had a very difficult time making the grade in school." 39 RR 197.

Counsel considered four options for presenting mitigation evidence to the jury. First, counsel wanted Jennings to testify himself *See* 39 RR 198; USCA5 136-37. Williams unsuccessfully moved the trial court to limit the State's cross-examination to only those mitigation-related matters contained in Jennings's factual proffer. 39 RR 196-200; CR 197-99. Concluding that the risks of an unrestricted cross-examination outweighed the benefits of Jennings's testimony, counsel decided, as a matter of trial strategy, not to call him. USCA5 137.

Second, counsel repeatedly interviewed Jennings's mother, Flora, and considered calling her as a mitigation witness. SHCR 78. Williams made a strategic

decision not to call her, explaining:

> My usual practice in preparing for the punishment phase of a capital murder trial is to interview the defendant and his family in an effort to discover any favorable evidence that can be presented to the jury at that phase of the trial. Provided that family members can testify in a manner beneficial to the defense, I will call them as witnesses at the punishment phase of trial.
>
> Robert Jennings'[s] mother was not very sympathetic to Jennings when I interviewed her. I elected not to present her as a punishment witness as a matter of trial strategy.

SHCR 351.

Third, counsel repeatedly interviewed Jennings's sister, Carla, and considered calling her as a witness. SHCR 80. But counsel again concluded that the risks outweighed the potential rewards. Williams stated:

> I reached the same decision with respect to the issue of calling Jennings'[s] sister to testify as a punishment witness. Like the mother, I did not think that [Carla's testimony] would benefit the defense. Also, Jennings'[s] sister was five or six years younger than [Jennings] who was placed at Gulf Coast Trade Center in 1973 and then committed to Texas Youth Council in 1974. From 1975 until the time he was charged with the capital murder offense, Jennings was convicted for several felony offenses and spent little time out of prison.

SHCR 351. Moreover, her testimony would provide a target-rich environment for cross-examination because the State could show that she was complicit in Jennings's crimes. *See, e.g.*, SHCR 303 (Jennings gave Carla proceeds from armed robberies); SHCR 305 (Carla drove Jennings to the hospital for an injury he suffered while fleeing Mr. Peeper's Bookstore).

Fourth, counsel concluded that the best alternative for a mitigation witness was a Harris County prison chaplain. The chaplain told the jury that he had counseled Jennings "two to three days a week" while Jennings was awaiting his capital-murder trial, and testified that Jennings was an asset in the chaplain's ministry, that Jennings served other inmates, and that Jennings was not

"incorrigible." 39 RR 187-88, 190-91.

During its closing argument, the defense urged the jury to impose a life sentence, arguing first that Jennings was remorseful, *see* 39 RR 230-31, 234-36; and second, that Jennings could be rehabilitated. *See* 39 RR 228-29, 231-32, 237-38. The jury rejected Jennings's arguments and sentenced him to death. 39 RR 253-56.

III. The State-Court Proceedings

A. Jennings's habeas claims

Following the conclusion of his unsuccessful direct appeal, *Jennings v. State*, No. 70,911 (Tex. Crim. App. Jan. 19, 1993) (unpublished), *cert. denied*, *Jennings v. Texas*, 510 U.S. 830 (1993), Jennings received a new lawyer and, on September 20, 1996, filed a state habeas application urging two claims. SHCR2-38. First, Jennings argued that he received penalty-phase ineffective assistance of counsel because trial counsel failed to call his mother and sister, both of whom "could have testified" regarding Jennings's troubled background, SHCR 26, 77-80 (supporting affidavits).

Second, Jennings argued that trial counsel were ineffective because they failed to find and present to the jury a psychological report dated June 21, 1978, and signed by Dr. J.M. Bloom ("Bloom Report"). Dr. Bloom evaluated Jennings to determine his competency to stand trial for three violent felonies committed in May 1978, and provided superficial evidence that Jennings had "mild organic brain dysfunction and mild retardation." SHCR 239. Dr. Bloom ultimately concluded, however, that the superficial evidence was unreliable because Jennings exhibited classic signs of malingering, and was "attempting to present himself as a mentally ill person in order to delay proceedings." SHCR 241-42; *see also* SHCR 241 ("Although the results of psychological assessment techniques suggest[ ] the presence of mild mental[ ] retardation and mild organic brain dysfunction, it is the opinion that these are not severe enough to produce the kind of deficits which Mr.

Jennings manifested during [the] interview."). The Bloom Report was included in the State's file of Jennings's extraneous offenses, which trial counsel Williams reviewed before trial. *See* 29 RR 6-7; SHCR 351. Nevertheless, Williams testified that he was "unaware of [Dr. Bloom's] prior psychological evaluation." SHCR 41.

Other evidence available or discoverable by trial counsel at the time of trial was consistent with the Bloom Report and confirmed that Jennings does not suffer from brain damage or low IQ. For example, the day after Dr. Bloom evaluated Jennings, Dr. John D. Nottingham performed an independent psychiatric examination of him. *See* SHCR 243-44 (Nottingham Report). Dr. Nottingham described Jennings as "quite evasive" during the interview and concluded that Jennings "is attempting to appear to be mentally disturbed on a voluntary basis and to be evasive and withholding, again, on a voluntary basis." SHCR 244. Dr. Nottingham further concluded that "[t]here does not appear to be a disease of the mind or mental defect which would interfere with this individual's ability to consult with his attorney" or to "understand[] the proceedings against him." *Id.*

Also, on October 26, 1978, the Harris County Pre-Sentencing Investigation Unit completed a background report on Jennings. *See* SHCR 248-56 (1978 PSI). Investigators noted that Jennings obtained his GED and over forty semester hours of college credit. SHCR 253. In an interview with investigators, Jennings's mother described him as "intelligent" and "really a good boy." SHCR 255-56. A family acquaintance told investigators that Jennings "is an intelligent person." SHCR 256. And, consistent with the impressions of Drs. Bloom and Nottingham, Jennings's probation officer testified that Jennings was attempting to manipulate the system to his advantage: "Although he is expressing a desire to rehabilitate himself at this time, it is felt that he is attempting to manipulate the Court to give him a second chance which he refused to give the community in which he lived." *Id.*

Prior to his capital trial for murdering Officer Howard, the state court ordered Jennings to undergo yet another competency evaluation on April 21, 1989. *See* SHCR 245-47 (Brown Report). Dr. Jerome Brown found that Jennings was "surly," "uncooperative," and attempting to obstruct the state's prosecution of him. SHCR 246-47. Based on Jennings's demeanor, his responses, and Dr. Brown's professional experience, Dr. Brown concluded that Jennings "is free of significant mental illness or mental defect." SHCR 247. And notwithstanding Jennings's efforts to obstruct the process, Dr. Brown concluded that "it was quite apparent that he is well aware of his current legal situation and what is taking place concerning the present proceedings against him." *Id.*

Jennings's prison records from the 1970s and 1980s further corroborated both his intelligence and his malingering motivations. After he was sentenced to prison—and thus had nothing to gain from malingering during his mental-health exams—Jennings could suddenly remember the year of his birth and his father's name. *Compare* SHCR 262, 267; *with* SHCR 47 (Bloom Report) (claiming not to remember those details). Jennings also assembled an impressive array of academic achievements while incarcerated: Jennings scored 105 on an IQ test, SHCR 341; earned his GED, SHCR 333; completed 1500 class hours in the TDCJ barbering college, earning the second-highest grades available for both performance and proficiency, and was awarded a professional degree, SHCR 326; completed an apprenticeship program and passed a written examination to become a certified butcher, 31 RR 535-36; and completed college courses ranging from basic English (grade: A) to business math (grade: B), and never scoring below a C. SHCR 334.

The evidence assembled after Jennings went to prison for capital murder further supported a conclusion that Jennings did not suffer from mental impairment. Prison records submitted during state habeas proceedings reveal that

Jennings "[wa]s oriented and display[ed] adequate short and long term memory. His affect [wa]s appropriate and pleasant and there [wa]s no evidence of a thought disorder. Thinking [wa]s linear and goal oriented. *A brief Psychiatric Rating Scale completed on this inmate [wa]s within normal limits. Intellectual functioning [wa]s judged to be at least within the average range* as evidenced by his educational attainments." SHCR 259 (emphasis added); *see also* SHCR 268 (Jennings's "appearance, psychomotor activity and behavior seemed normal. The inmate's thinking process and thought content were clear and he possessed a good memory.")

Moreover, trial counsel's personal experiences with Jennings reinforced their knowledge of his intelligence and lack of mental-health problems. As Williams explained, "there was nothing about [Jennings]" in any of Williams's interactions and conversations with him before and during trial "to indicate that he suffered from a mental illness or mental retardation." SHCR 352

B. Expert testimony in state habeas proceedings

During the state habeas proceedings in 1996, habeas counsel retained three doctors to perform post-hoc mental evaluations of Jennings. First, on July 10, 1996, Dr. Meyer Proler performed an electroencephalography (EEG) test. SHCR 72. EEGs use electrodes to measure blips in brain activity. *See, e.g.*, Marc Nuwer, *Assessment of Digital EEG, Quantitative EEG, and EEG Brain Mapping: Report of the American Academy of Neurology and the American Clinical Neurophysiology Society*, 49 NEUROLOGY 277, 278 (1997) (hereinafter, "Nuwer, NEUROLOGY"). A doctor then visually inspects the blips in search of abnormalities. *Id.* Dr. Proler found Jennings's EEG test results "normal." SHCR 72. Dr. Proler then performed a quantitative electroencephalography (QEEG) test. *Id.* The QEEG also uses electrodes to measure blips in brain activity. Some of those blips are "artifacts"—noise in the data that are not indicative of anything other than the imperfection of

QEEG technology. Some doctors think that, after subtracting the "artifacts" from a QEEG report, the remainder of the blips can be analyzed using mathematical equations to reveal neurological abnormalities. The American Academy of Neurology and the American Clinical Neurophysiology Society, however, have concluded that QEEGs are too subjective, unreliable, and error-prone to be used in a clinical setting for diagnosing "postconcussion syndrome, mild or moderate head injury, learning disability," or any related neurological problem. Nuwer, NEUROLOGY at 285. Despite the unreliability of the QEEG, Dr. Proler nevertheless found that Jennings's QEEG blips were consistent with "affective disorder and/or learning disability," and suggested that Jennings might benefit from being "treated with antidepressants." SHCR 73. He hastened to add, however, that his analysis of Jennings's report had no independent probative value and "serves only as an adjunct to other clinical evaluations." *Id.*

Second, on July 25, 1996, Jennings was given a single photon emissions tomograph (SPECT) study. SHCR 75-76. Jennings was injected with a "tracer" molecule and then studied to see how that tracer coursed through his brain. SHCR 75. The SPECT technician then gave some—but not all—of the test results to Dr. Theodore Simon. *Id.* Dr. Simon emphasized that he never received from the tester the "banded color table" used to conduct the test, and thus he had no means to interpret the colors in the test results. *Id.* Dr. Simon further emphasized that he had no information regarding "the binding or age on the tracer" used to conduct the SPECT study—a dramatic limitation, given that "this is a highly unstable tracer which should be injected within fifteen minutes of preparation." *Id.* Dr. Simon noted that the SPECT results were consistent with a "brain [that] has been injured," but he did not explain how he could reach that conclusion without the banded color table, nor did he explain whether he could have any confidence in the results

without knowing anything about the "highly unstable tracer" used in the test. *Id.*

Third, Drs. Proler and Simon sent their highly contingent conclusions to consultant, Dr. Windel Dickerson. SHCR 67. Dr. Dickerson concluded that Jennings is not mentally retarded, but nevertheless concluded that the QEEG and SPECT tests performed by Drs. Proler and Simon "confirm my earlier hypotheses that Mr. Jennings suffers from periods in which impulsive action overcomes the capacity for reason and foresightful [sic] action." SHCR 68. Dr. Dickerson did not mention the limitations, qualifications, or reservations that Drs. Proler and Simon expressed in performing their tests, did not explain how his conclusion was supported by the QEEG and SPECT results, and did not explain how or why his suspicions were consistent with the Nottingham Report, the 1978 PSI, the Brown Report, or Jennings's numerous academic achievements and credentials.

In response, the State hired Dr. Victor Scarano to evaluate Jennings's information. SHCR 336. Dr. Scarano concluded that nothing in Jennings's medical history or the facts of his criminal conduct was consistent with mental retardation, organic brain dysfunction, or impulse-control problems. SHCR 336-45. Dr. Scarano further criticized Dr. Dickerson's reliance on the QEEG and SPECT results. SHCR 345-47. He emphasized that "[a] specific clinical advantage has yet to be unequivocally demonstrated for any of the quantitative EEG or mapping techniques" used by Jennings's experts. SHCR 347; *accord* Nuwer, NEUROLOGY at 285. And he noted that, even if the SPECT results could be considered a reliable picture of Jennings's brain in 1996, they would "tell[ ] nothing about the brain in 1988" when Jennings murdered Officer Howard. SHCR 346.

C. The state habeas decision

The state trial court entered written findings of fact crediting the State's evidence and discrediting Jennings's evidence, along with conclusions of law

rejecting Jennings's application for relief. *See* SHCR 410-26. It found, as a matter of fact, that Jennings "was malingering a mental disease or defect" when he pretended to have a low IQ and symptoms consistent with "mild organic brain dysfunction" during his interview with Dr. Bloom. SHCR 411. It further found that Jennings "was intentionally evasive, withheld information, and attempted to appear mentally disturbed on a voluntary basis" during his interview with Dr. Nottingham. SHCR 412. It credited as persuasive Dr. Scarano's report and discredited as unpersuasive Dr. Dickerson's report. SHCR 413. It further credited the overwhelming record evidence of Jennings's intelligence—ranging from Jennings's GED, college coursework, butchering certificate, and barbering classes to the methodical planning of his criminal activities. And on the basis of that evidence, found that trial counsel would have had no reason to look for the Bloom Report (or to suspect that Jennings had any mental problems even had they found it). SHCR 413-15. The state court thus found that Jennings "fail[ed] to demonstrate that he suffers from mental retardation or organic brain dysfunction. SHCR 414. Therefore, Jennings failed to show either that his trial counsel were deficient or that he suffered prejudice. SHCR 425. Accordingly, it recommended denial of Jennings's habeas application, and the CCA agreed.

Next, the state court found that Jennings's trial counsel made reasonable and fully informed decisions not to present evidence regarding his background through Flora, Carla, or Jennings himself. SHCR 415-17. The court concluded, as a matter of fact, that trial counsel were aware of what both women would say but nonetheless selected, as a matter of trial strategy, to not present" their testimony because it "would not benefit [Jennings]." SHCR 416. The court further concluded that trial counsel's strategy was reasonable given the potentially damaging facts the State could have introduced through cross-examinations of the witnesses. SHCR 416-17.

On the basis of those findings, the court found that Jennings failed to show either that his trial counsel were deficient or that he had suffered prejudice, SHCR 425, and recommended that the CCA deny Jennings's habeas application. The CCA agreed and denied relief. *See Ex parte Jennings*, Nos. AP-75806 & AP-75807, 2008 WL 5049911 (Tex. Crim. App. Nov. 26, 2008).

IV. Disposition in the Federal District Court

Without mentioning the state court's factual findings or the presumption of correctness that AEDPA attaches to them, *see* 28 U.S.C. § 2254(e)(1), the federal district court issued its own factual findings and then granted habeas relief, finding trial counsel's decision not to present Jennings's sister's testimony—because she was "too young to remember pertinent events and conditions"—was objectively unreasonable and not sound trial strategy, as was trial counsel's decision to present no evidence of Jennings's background. *Jennings v. Thaler*, No. H-09-219, 2012 WL 1440387, at *4 (S.D. Tex. Apr. 23, 2012).

Second, the court found as a matter of fact that "Dr. Bloom's report did conclude that Jennings has low IQ and brain damage." *Id.* at *5. And, without acknowledging the additional evidence credited by the state court, the district court concluded that trial counsel were objectively deficient for failing to uncover Dr. Bloom's findings. *Id.*

Third, the district court concluded Jennings was prejudiced by trial counsel's failure to call Carla and to uncover the Bloom Report. The court found that, if presented with evidence of brain damage, poor impulse control, and low IQ, a juror could have voted to save his life. *Id.* at *6. The court also concluded that the evidence of Jennings's background and character, along with evidence of mental impairment might have been sufficient to lead at least one juror to conclude that Jennings did not deserve death. *Id.* at *7. The court found that "[t]he similarities

between this case and *Williams* are too strong to ignore, and the [CCA] 'decided [the] case differently than [the Supreme Court] has on a set of materially indistinguishable facts.'" *Id.* (citing *Williams v. Taylor*, 529 U.S. 362, 406 (2000)).

V. Disposition in the Fifth Circuit

The Director timely appealed to the Fifth Circuit. USCA5, 123-25. When Jennings filed his Appellee's brief, he raised a "cross-point" for appeal on a claim decided against his interest by the district court, but did not seek COA from the district court or the Fifth Circuit on this issue. Following oral argument, the Fifth Circuit reversed the district court, dismissed Jennings's cross-point and denied COA, and rendered judgment denying habeas relief. *Jennings v. Stephens*, No. 12-70018, 2013 WL 3787589, *12 (5th Cir. July 22, 2013). No execution date is set. t.

REASONS FOR DENYING THE WRIT

The Rules of the Supreme Court provide that review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only for "compelling reasons." Sup. Ct. R. 10 (West 2011). Jennings advances no compelling reason, and none exist. First, the record shows Jennings has an IQ score of 105, and any evidence to the contrary is unreliable, tainted by evidence of Jennings's malingering, and refuted by expert testimony. Second, Jennings's trial counsel made a fully informed and strategic decision not to call Jennings's mother or sister as mitigation witnesses. Third, Jennings's *Penry*[1] argument is defaulted in the state court and otherwise meritless. Finally, only one court has held that a COA and cross-appeal are unnecessary for a prisoner to enlarge the relief he won in the district court, and that court relied on inapposite cases involving private civil appeals and hence do not reflect the COA's "gatekeeping function." *Gonzales v. Thaler*, 132 S. Ct. 641, 650 (2012).

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[1] *Penry v. Lynaugh*, 492 U.S. 302, 323-25 (1989) (*Penry I*)

I. The Fifth Circuit Committed No Error by Reversing the District Court's Grant of Federal Habeas Relief Based Upon the Assistance of Counsel at the Punishment Phase of Trial. (Issues I and II)

The Fifth Circuit committed no error in reversing the district court's grant of habeas relief on two ineffective-assistance-of-trial-counsel claims. The state court reviewed these claims on the merits and denied relief. Under AEDPA's relitigation bar, 28 U.S.C. § 2254(d), federal habeas relief was thus foreclosed under all but the most limited circumstances. *Harrington v. Richter*, 131 S. Ct. 770, 785-86 (2011). Specifically, a federal writ of habeas corpus may not issue unless the state court's adjudication of the constitutional claim (1) "'was contrary to' federal law then clearly established in the holdings of" the Supreme Court; or (2) "'involved an unreasonable application of'" clearly established Supreme Court precedent; or (3) "'was based on an unreasonable determination of the facts' in light of the record before the state court." *Id.* at 785 (quoting *Williams*, 529 U.S. at 412); § 2254(d).

Ineffective-assistance-of-counsel claims are particularly difficult to win under § 2254(d). To obtain relief, the petitioner must first demonstrate deficient performance by showing that trial counsel's conduct falls beyond the bounds of prevailing, objective professional standards. *Strickland v. Washington*, 466 U.S. 668, 688 (1984). The reviewing court must ask whether counsel's performance "amounted to incompetence under prevailing professional norms, not whether it deviated from best practices or most common custom." *Richter*, 131 S. Ct. at 788 (citing *Strickland*, 466 U.S. at 690).

Second, a petitioner must affirmatively prove prejudice by demonstrating "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Williams*, 529 U.S. at 391 (citing *Strickland*, 466 U.S. at 694). Regarding counsel's failure to investigate and present mitigating evidence at the punishment phase of trial, the reviewing court must "reweigh the

evidence in aggravation against the totality of available mitigating evidence[,]" including that adduced at trial, as well as the habeas proceeding. *Wiggins v. Smith*, 539 U.S. 510, 534 (2003). The "likelihood of a different result must be substantial, not just conceivable." *Richter*, 131 S. Ct. at 792.

Furthermore, while "[s]urmounting *Strickland's* high bar is never an easy task," "[e]stablishing that a state court's application of *Strickland* was unreasonable under § 2254(d) is all the more difficult." *Id.* at 788. In particular:

> The standards created by *Strickland* and § 2254(d) are both highly deferential, and when the two apply in tandem, review is doubly so. The *Strickland* standard is a general one, so the range of reasonable applications is substantial. Federal habeas courts must guard against the danger of equating unreasonableness under *Strickland* with unreasonableness under § 2254(d). When § 2254(d) applies, the question is not whether counsel's actions were reasonable. The question is whether there is any reasonable argument that counsel satisfied *Strickland's* deferential standard.

Id. (citation and internal quotation marks omitted). Thus, the reviewing court "must apply a 'strong presumption' that counsel's representation was within the 'wide range' of reasonable professional assistance," *id.* at 787, and second, the court must apply that "strong presumption" through the highly "deferential lens of § 2254(d)," *Knowles v. Mirzayance*, 556 U.S. 111, 121 n.2 (2009). This Court has explained:

> If this standard is difficult to meet, that is because it was meant to be. As amended by AEDPA, § 2254(d) stops short of imposing a complete bar on federal court relitigation of claims already rejected in state proceedings. As a condition for obtaining habeas corpus from a federal court, [however,] a state prisoner must show that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement.

Richter, 131 S. Ct. at 786-87 (citation omitted).

Jennings's claims before the district court failed to rise to this standard. The district court impermissibly substituted its own factual findings and legal conclusions for those of the state court. This de novo review was inconsistent with

AEDPA, and the Fifth Circuit committed no error in reversing the decision.

A. Jennings suffered no prejudice from trial counsel's decision not to present potential evidence of low IQ or brain damage. (Issue I).

Record evidence indicates that Jennings has an IQ of 105. *See* SHCR 341. Jennings nonetheless complains that his trial lawyers were ineffective for failing to uncover a 1978 report showing that Jennings (1) malingered during another IQ test and (2) *through malingering*, evidenced "mild organic brain dysfunction and mild retardation." This claim falls short of satisfying AEDPA's relitigation bar.

The CCA declined to decide whether trial counsel was deficient holding only that Jennings suffered no prejudice. *Ex parte Jennings*, 2008 WL 5049911, at *5. The CCA reasoned that evidence of mental impairment would not have influenced the jury's determination of the "deliberateness" special issue because the evidence was unreliable, and concluded that there is no reasonable probability—considering the meager mitigating evidence admitted at trial as well as the evidence developed during the habeas corpus proceedings—that Jennings's jury would have found sufficient mitigating facts to warrant a life sentence. *Id.* at *6-7.

This conclusion was entitled to deference, and the Fifth Circuit committed no error in reversing the district court's grant of relief. The Fifth Circuit correctly concluded that Jennings failed to show prejudice under *Strickland*. *Jennings v. Stephens*, 2013 WL 3787589, at *4. The Fifth Circuit disagreed with the district court's application of *Williams*, finding"there was significantly more mitigation evidence available in *Williams* than here[,]" and concluding Jennings's evidence was not of the same magnitude. *Id.* at *5. The Fifth Circuit was also not persuaded by the additional evidence developed during the state habeas proceeding, finding:

> At best, Jennings relies on the opinions of dueling experts who would have provided conflicting evidence concerning his mental capacity. This is insufficient to meet the burden under AEDPA's deferential standard, which requires Jennings to show that no reasonable jurists would have reached the

> same conclusion as the state habeas court. The [CCA] did not reach an unreasonable conclusion regarding the lack of prejudice, and under AEDPA its decision should stand.

Id. at *7; *see Chester v. Thaler*, 666 F.3d 340, 349 (5th Cir. 2011) ("Proceedings at the trial court were a battle between experts with additional testimony and evidence that was inconclusive and invited credibility testing. It is not this court's place to second-guess the court's credibility determinations.")

As that court correctly noted, to obtain relief from the state court, Jennings had to establish a "reasonable probability" that at least one juror would have persisted in a negative answer to a special issue based upon the evidence that his attorneys did not present. *Id.* at *4. The state court concluded he did not. Therefore, to overcome AEDPA's relitigation bar and avoid paying deference to the state court findings, Jennings had to establish that "no reasonable person could adopt the state habeas court's position that no prejudice occurred." *Id.* at *4; *see Richter*, 131 S. Ct. at 788 (under § 2254(d), court must ask "whether there is any reasonable argument that counsel satisfied *Strickland's* deferential standard."). The Fifth Circuit correctly concluded that the district court erred in finding no reasonable person would have adopted the state court's position. The evidence in existence at the time of trial showed that Jennings was of normal intelligence and malingered in an attempt to evade punishment. Any evidence that could have been presented at trial suggesting Jennings suffered from brain damage or low IQ would have been subject to damaging cross-examination and contrary evidence from competing experts.

Jennings's argument rests on trial counsel's failure to locate the Bloom Report and subsequently investigate Jennings's mental health. However, trial counsel's performance was not deficient. Every document in existence at the time of trial showed that Jennings was intelligent and merely malingering in an attempt to evade punishment. Given everything counsel knew, or could have known, about

Jennings's intelligence, counsel performed a reasonable investigation and then reasonably chose to focus their limited resources on other defenses. *See, e.g., Bobby v. Van Hook*, 558 U.S. 4, 11 (2009) (Defense counsel can avoid activities that appear "distractive from more important duties."); *Richter*, 131 S. Ct. at 789 ("Counsel was entitled to formulate a strategy that was reasonable at the time and to balance limited resources in accord with effective trial tactics and strategies.").

Both the CCA and the Fifth Circuit agreed that Jennings's claim failed for lack of prejudice. *See Ex parte Jennings*, 2008 WL 5049911, at *5; *Jennings*, 2013 WL 3787589, at *4-7. This finding was entirely reasonable. Even if counsel had attempted to prove that Jennings had low IQ or brain damage, there is no chance that their efforts would have changed the result of the punishment proceeding. Jennings's habeas counsel was unable to proffer any expert who could conclusively and credibly state that he suffered from a low IQ or brain damage. And any mental health evidence that trial counsel might have presented would have just as likely hurt Jennings because it would have been double-edged, and his experts would have been subject to devastating cross-examination.

Specifically, had Williams presented the Bloom Report to the jury, the defense could have been eviscerated on cross-examination, using the Bloom Report itself (which found Jennings was a malingerer) and other evidence in existence at the time (the Nottingham Report, the 1978 PSI, the Brown Report, Jennings's scholastic achievements, his professional certifications, and his 105 IQ score). No one reasonably could expect a jury to confront that lopsided presentation and reach a different conclusion. *See Cullen v. Pinholster*, 131 S. Ct. 1388, 1410 (2011); *Wong v. Belmontes*, 558 U.S. 15, 24-27 (2009); *Mitchell v. Epps*, 641 F.3d 134, 151 (2011).

Moreover, had counsel commissioned new tests based on suspicions raised by the Bloom Report, they would have come up empty. Even with the benefit of

hindsight and seven extra years of technological development, Jennings proffered only two neurological tests in 1996 to suggest that he may have a learning disability, may benefit from antidepressants, and may have a brain injury of unspecified type and severity. Even on their own terms, those tests are unreliable—both because professional authorities in neurology have rejected Jennings's use of QEEG, *see* Nuwer, NEUROLOGY at 285, and because he has no basis for believing his SPECT test results are premised on sound methodologies. Those liabilities would have provided ample fodder for cross-examination, and the state court reasonably found the post-hoc evidence incredible. *See id.*; SHCR 345-47 (Scarano Report). And Jennings's own habeas expert concedes that QEEG tests and SPECT scans could have been unavailable in 1989. SHCR 68. But no matter what tests Williams could have commissioned or deficits the tests could have purported to show, the defense still would have had to persuade the jury to believe their hired experts over the unanimous agreement by disinterested doctors dating back decades, all of whom previously found Jennings was not brain-damaged and was faking any alleged mental impairment.

Had the jury credited such post-hoc evidence at all, it likely would have found it an aggravating factor favoring the death penalty. *See Atkins v. Virginia*, 536 U.S. 304, 321 (2002) (recognizing mitigating evidence can be a "two-edged sword"); *Penry I*, 492 U.S. at 323-25 (same); *Ladd v. Cockrell*, 311 F.3d 349, 359-60 (5th Cir. 2002) (evidence of mental retardation and low IQ is "double-edged" because it might suggest lack of moral culpability or future dangerousness). Or the jury could have rejected the hypothetical mental-health evidence—as the CCA did—as irrelevant because it could not explain or excuse the deliberateness and calculated cold-bloodedness inherent in Jennings's criminal activity including the execution-style murder of a police officer. *See Ex parte Jennings*, 2008 WL 5049911, at *6-7.

In sum, the evidence is not sufficient to demonstrate that no reasonable jurists would have reached the same conclusion as the state habeas court, and the Fifth Circuit did not err in reversing the district court's grant of habeas relief.

Jennings nevertheless argues that the Fifth Circuit erred in failing to recognize that the CCA applied an erroneous legal standard of review for determining prejudice—that at least ten jurors would have answered a special issue in a way that would have resulted in a life sentence, instead of only one juror. Petition at 20. Jennings argues that this alleged "ten-juror" analysis conflicts with *Wiggins*, which requires only proof that at least one juror would have answered the issues differently to demonstrate prejudice. *See* 539 U.S. at 537.

First, the CCA applied the correct standard in deciding that Jennings failed to prove prejudice. *Strickland* requires the petitioner to "show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." 466 U.S. at 694. In assessing prejudice, the CCA held Jennings to this burden. *See Ex parte Jennings*, 2008 WL 5049911, at *2. The CCA specifically acknowledged the ability of one juror to view the proposed evidence as mitigating. *See id.* at *7 ("A rational *juror* might even believe that an individual growing up with frontal and/or temporary lobe damage has endured a generally more disadvantaged life than one who suffered no such disability.") (emphasis added). But the CCA also noted there was "precious little other evidence of mitigating value to counter-act the substantial, non-statutory aggravating circumstances in this case." *Id.* The CCA thus concluded there was no reasonable probability that Jennings's jury would have viewed the "meager testimony at trial together with the evidence developed during the habeas proceeding" as sufficiently mitigating to warrant a life sentence. *Id.* at *7; *see also*

Wiggins, 539 U.S. at 534 (requiring court to reweigh evidence in aggravation against available mitigating evidence). The CCA relied upon the controlling precedent of this Court in concluding that Jennings failed to prove that, given the evidence, *any* rational juror—not even one—would have concluded differently.

In granting relief, the district court did not suggest that the CCA applied an erroneous standard, but concluded that the state court's prejudice determination was an unreasonable determination of the facts because that court believed that evidence of brain damage and poor impulse control could have convinced at least one juror to answer the deliberateness special issue differently. *Jennings v. Thaler*, 2012 WL 1440387, at *6. However, the Fifth Circuit properly reversed on grounds that Jennings's evidence—which only conflicted with the state's evidence but did not disprove it—was insufficient to meet the required burden under AEDPA's deferential standard, that is, *no* reasonable jurist would have reached the same conclusion as the state habeas court. *Jennings v. Stephens*, 2013 WL 3787589, at *7. The conflicting evidence did not demonstrate the state court's ruling "was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Richter*, 131 S. Ct. at 786-87. The district court improperly substituted its own factual findings for those of the state court and failed to apply proper deference to the state court's findings, including credibility determinations, as required under AEDPA. *See* 28 U.S.C. § 2254(e)(1). Therefore, the Fifth Circuit committed no error in reversing.

Finally, Jennings faults the Fifth Circuit for distinguishing his case from *Williams* on grounds that *Williams* presented "significantly more mitigation evidence," asserting that this "comparative analysis" was impermissible. As support for his argument, Jennings relies on a series of Supreme Court cases which held that the presence of an unconstitutional nullification instruction required reversal

of a death sentence, regardless of the quantity or quality of mitigating evidence presented at the punishment phase of trial. Petition at 21-22 (citing *Abdul-Kabir v. Quarterman*, 550 U.S. 233 (2007); *Brewer v. Quarterman*, 550 U.S. 286 (2007); *Smith v. Texas*, 550 U.S. 297 (2007)). Jennings extends the holdings of these Eighth Amendment cases too far.

These cases hold that the pre-*Penry* jury instructions in Texas were fatally flawed because they prevented the jury from meaningfully considering and giving effect to mitigating evidence. *See Abdul-Kabir*, 550 U.S. at 264-65; *Brewer*, 550 U.S. at 288-96; *Smith*, 550 U.S. at 310. The deficient instructions prohibited the jury from considering *any* relevant mitigating evidence, regardless of the quality or quantity of that evidence as compared to other cases. But these opinions find fault with the jury instructions themselves, not the comparison of evidence to that in other cases. Indeed, this Court's interpretation of AEDPA in *Williams* invites a "comparative analysis" in a *Strickland* context, holding that a state-court decision is contrary to clearly established precedent if it "confronts a set of facts that are materially indistinguishable from a decision of this Court and nevertheless arrives at a result different from our precedent." 529 U.S. at 406.

Regardless, the Fifth Circuit did not deny relief simply because Jennings's evidence did not rise to the level of that in *Williams*. Jennings ignores the Fifth Circuit's subsequent analysis, weighing all available evidence from the trial and state habeas proceeding, before concluding that Jennings failed to meet his burden of proving prejudice. The Fifth Circuit reweighed the evidence as required by this Court's precedent, with a substantial amount of deference paid to the reasonable determination of the state habeas court. *See Wiggins*, 539 U.S. at 534. This analysis comports with this Court's clearly established precedent.

B. Trial counsel was not ineffective, and Jennings suffered no prejudice from trial counsel's decision not to present evidence of a difficult childhood. (Issue II)

Jennings complained that trial counsel was ineffective for failing to present mitigation testimony from Jennings, his mother, and his sister regarding his difficult childhood. The Fifth Circuit reversed the district court's grant of relief, concluding there was no error in the state court conclusion that Jennings's attorneys "reasonably could have decided that the risks associated with [Carla's] unsympathetic testimony outweighed any benefits." *Jennings v. Stephens*, 2013 WL 3787589, at *8. The court reasoned that evidence of a disadvantaged background can be a "'double-edged' sword," and, because Jennings's attorneys could reasonably conclude that resources were better spent focusing on Jennings's lack of future dangerousness, the CCA reasonably concluded that trial counsel was not deficient with respect to their strategic decision to omit this evidence. *Id.* Jennings asks for certiorari review of the Fifth Circuit's decision. Petition at 26-34.

But the Fifth Circuit committed no error. It is undisputed that trial counsel knew of Jennings's background and Jennings does not argue that trial counsel should have investigated more. Rather, Jennings argues trial counsel made a bad decision, and that trial counsel must always present mitigating evidence, even if the evidence is double-edged. Jennings cites no authority to support this proposition, nor does this Court impose such a requirement. *See Pinholster*, 131 S. Ct. at 1410; *Belmontes*, 558 U.S. at 24-27.

Trial counsel acted both strategically and on the basis of complete information in deciding which witnesses to call in the punishment phase. The state habeas court found as a matter of fact that (1) "defense counsel were aware of potential background evidence concerning [Jennings]," and (2) they "elected, as a matter of trial strategy," not to present it. SHCR 416. Jennings also conceded that

counsel "knew about [Jennings's] disadvantaged background" and made a "strategic decision" not to present it. USCA5 32. Thus, the only question is whether counsel's fully informed decision nonetheless falls into the small category of trial strategies that, even after eliminating the distorting view of hindsight, were "so ill chosen that it permeates the entire trial with obvious unfairness." *Pape v. Thaler*, 645 F.3d 281, 291 (5th Cir. 2011) (citation and internal quotation marks omitted).

Jennings cannot prove that trial counsel's fully informed strategy decision was deficient. "[A]n attorney's strategic choices, usually based on information supplied by the defendant and gathered from a thorough investigation of the relevant law and facts, 'are virtually unchallengeable.'" *Bryant v. Scott*, 28 F.3d 1411, 1415 (5th Cir. 1994) (quoting *Strickland*, 466 U.S. at 690-91). Jennings's trial lawyers were "entitled to formulate a strategy that was reasonable at the time and to balance limited resources in accord with effective trial tactics and strategies." *Richter*, 131 S. Ct. at 789. In evaluating defense counsel's chosen strategy, the reviewing court must be "highly deferential" and must make every effort to "eliminate the distorting effects of hindsight." *Strickland*, 466 U.S. at 689.

In this case, it is undisputed that trial counsel knew of Jennings's troubled childhood. But counsel concluded that Jennings's upbringing would carry less mitigating force than his remorse, capacity for rehabilitation, and the fact that he would not commit "acts of violence" in prison if given a life sentence. *See Clark v. Thaler*, 673 F.3d 410, 419 (5th Cir. 2012) (noting this Court "has explicitly rejected a 'constitutional duty to investigate' applicable to all cases, instead emphasizing that the 'constitutionally protected independence of counsel' precludes the establishment of a 'particular set of detailed rules' or even 'specific guidelines' beyond reasonableness" (quoting *Pinholster*, 131 S. Ct. at 1406)).

Likewise, Jennings's counsel reasonably could fear the jury's reaction to

unsympathetic testimony from Flora and Carla, *see* SHCR 351, because if his own mother and sister did not feel strongly about sparing his life, it is unclear why twelve strangers should. *See Woods v. Thaler*, 399 Fed. App'x 884,893-94 (5th Cir. 2010) (counsel did not call "self-centered, uncaring mother" because she would not be an effective witness). Moreover, calling either woman would have opened the door to wide-ranging cross-examination regarding, among other things, Jennings's bad character, traits, and acts; the money he stole and then shared with them; and the things he said or did while in the car with Carla immediately after he murdered Officer Howard. *See* SHCR 416-17. As found by the state court, Carla and her mother had already provided potentially harmful information on a 1978 PSI report—Jennings was very moody and tended to withdraw, he was "mixed up," he was constantly truant and in trouble with the law as juvenile, and exhibited strange or usual behavior. SHCR 417.

The district court's justifications for rejecting the state court's decision are untenable. First, the district court found unpersuasive trial counsel's statement that Jennings's sister was too young to remember pertinent events. *See Jennings v. Thaler*, 2012 WL 1440387, at *4. But Jennings's counsel said no such thing. Rather, trial counsel Williams stated first that, like that of her mother, he "did not think that the testimony of Jennings'[s] sister would benefit the defense." SHCR 351. Trial counsel went on to add: "Also, Jennings'[s] sister was five or six years younger than [Jennings]" who "spent little time out of prison" after 1973. SHCR 351. Trial counsel never stated Carla was "too young to remember," as suggested by the district court; rather, trial counsel asserted Jennings did not spend much time around his sister.

In any event, trial counsel's stated reasons are the starting point under *Strickland*, not the finish line. *See Pinholster*, 131 S. Ct. at 1407 ("The Court of

Appeals [i]s required not simply to give the attorneys the benefit of the doubt, but to affirmatively entertain the range of possible reasons [Jennings's] counsel may have had for proceeding as they did.") (citations and internal quotation marks omitted)); *Richter*, 131 S. Ct. at 790 ("*Strickland* calls for an inquiry into the objective reasonableness of counsel's performance, not counsel's subjective state of mind."). In this case, Jennings murdered a police officer in cold blood, firing two of four bullets into the back of his head "execution style" while he lay face down, moaning and dying. *Ex parte Jennings*, 2008 WL 5049911, at *3. In considering how best to convince the jury not to impose the death penalty for such a crime, counsel reasonably could decide that efforts to engender sympathy for Jennings on account of his background would be fruitless or counterproductive. *See* SHCR 417 (state habeas court decision crediting defense counsel's choice to argue lack of future dangerousness); *see also Brown v. Thaler*, 684 F.3d 482, 498-99 (5th Cir. 2012) (where Brown and his accomplices murdered four people, defense counsel reasonably concluded best sentencing strategy was to argue lack of future dangerousness, rather than lack of moral culpability). And given the risks Carla's testimony would involve, Jennings falls short of carrying his heavy burden to prove that his trial counsel "made errors so serious that [they were] not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Strickland*, 466 U.S. at 687; *see* SHCR 416-17 (finding decision not to present Carla's testimony reasonable given potential damaging cross-examination evidence).

The district court's second justification for granting federal habeas relief was that, "[w]hatever damage counsel may have feared from cross-examination of Jennings or [Flora's] hostility toward her son," was far outweighed by the damage from presenting no background evidence at all. *Jennings v. Thaler*, 2012 WL 1440387, at *4. But this Court has rejected this sort of "nothing to lose" theory of

deficient performance. *See Mirzayance*, 556 U.S. at 126-27 (reversing court of appeals' determination that counsel had "nothing to lose" by raising insanity defense and holding that is not the Sixth Amendment standard for deficient performance). Indeed, the nothing-to-lose standard is precisely the sort of 20-20 hindsight that *Strickland* prohibits. *See Richter*, 131 S. Ct. at 789.

Finally, the district court asserted that *Wiggins* and *Williams* "make clear that failure to present available significant mitigating evidence resulting in the virtual absence of a mitigation case is deficient performance." *Jennings v. Thaler*, 2012 WL 1440387, at *4. But in fact, *Wiggins* said the exact opposite. *See* 539 U.S. at 533 ("Nor does *Strickland* require defense counsel to present mitigating evidence at sentencing in every case."). And in subsequent cases, this Court has held that neither *Wiggins* nor *Williams* can be read to impose even "a constitutional duty to investigate," *Pinholster*, 131 S. Ct. at 1406 (internal quotation marks omitted)—much less can they be read to create a constitutional duty to present the evidence of that (nonobligatory) investigation.[2] Rather, *Wiggins*, *Williams*, and all of the Court's *Strickland* jurisprudence establish a much more modest proposition: "the general requirement of reasonableness." *Id.*; *see Van Hook*, 558 U.S. at 9 ("[T]he Federal Constitution imposes one general requirement: that counsel make objectively reasonable choices.").

Jennings nevertheless attacks the Fifth Circuit's reversal of the district court, first asserting that it is based upon and inaccurate factual premise—that Carla's testimony was "unsympathetic"—which is not supported by any state court decision or evidence. Petition at 30-31; *Jennings v. Stephens*, 2013 WL 3787589, at *8. However, this factual premise is accurate and supported by trial counsel's affidavit. Trial counsel attested that he did not call Jennings's mother as a matter

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[2] But if such a constitutional duty to investigate existed, Jennings concedes that his lawyers satisfied it. *See* USCA5 32.

of strategy because she was unsympathetic, and that he "reached the *same decision* with respect to the issue of calling Jennings's sister to testify as a punishment witness. *Like the mother,* I did not think that the testimony of Jennings'[s] sister would benefit the defense." SCHR 351 (emphasis added); *Jennings v. Stephens,* 2013 WL 3787589, at *7-8. Trial counsel specifically compared Carla's potential testimony to Flora's, which he found unsympathetic. The Fifth Circuit's conclusion was based upon this evidence and does not conflict with any state court finding that trial counsel's decision to withhold background evidence was an informed, strategic one. *See Ex parte Jennings,* 2008 WL 5049911, at *5; SHCR 415-17, 426.

Jennings also faults the Fifth Circuit for failing to give proper consideration to the testimony that Carla could have provided regarding the sordid conditions of their home and the poor parenting skills of their mother. Petition at 31. But the Fifth Circuit did acknowledge the importance of this testimony, noting that "omitting her testimony meant jurors heard no evidence regarding Jennings'[s] disadvantaged background." *Jennings v. Stephens,* 2013 WL 3787589, at *8. But the court also considered that such evidence could be a "double-edged" sword and that counsel could reasonably have focused on proving a lack of future dangerousness. *Id.* As previously noted, the court of appeals must "entertain a range of possible reasons" for counsel's behavior, *Pinholster,* 131 S. Ct. at 1407, based upon objective not subjective reasonableness, *Richter,* 131 S. Ct. at 790. Trial counsel could have made an objectively reasonable decision to forego this evidence because it was subject to damaging cross-examination. *See* SHCR 416-17.

Jennings also complains that focusing on a lack of future dangerousness was not actually trial counsel's strategy, and the Fifth Circuit erred to conclude otherwise. *See Jennings v. Stephens,* 2013 WL 3787589, at *8; Petition at 32. He offers no credible support for this argument. Trial counsel did not state his specific

strategy in his affidavit. SHCR 350-52. And the fact that trial counsel initially attempted to call Jennings to proffer background testimony does not mean that mitigation was trial counsel's primary strategy. Indeed, trial counsel determined *before trial* that he would not call Jennings's mother and sister to present similar evidence, *see* SHCR 351, and did not alter this decision after the court denied Jennings's request to testify without cross-examination. This suggests that counsel's intended strategy was to rely primarily on the chaplain's testimony, which was clearly aimed at disproving future dangerousness and deliberateness. *See* SHCR 417; 39 RR 185-90.

Jennings's also cites to closing argument as further proof that trial counsel did not intend to rely on a lack of future dangerousness as a punishment strategy. Petition at 32-33. While trial counsel did not state outright that Jennings would not be a future danger, the cited portions of trial counsel's closing argument—suggesting Jennings did not act deliberately, demonstrated remorse, committed no acts of violence in prison, and the chaplain did not find him incorrigible, *see* Petition at 32—clearly weigh against a future dangerousness finding. And trial counsel did argue that Jennings had committed no "acts of violence" during a prior incarceration. *See* 39 RR 238 (disciplinary violations "weren't acts of violence because if they were you would have known about it from the State")

Moreover, Jennings fails to prove prejudice for two reasons. First, the omitted mitigation evidence pales in comparison to the overwhelming aggravating evidence. *See Woodford v. Visciotti,* 537 U.S. 19, 26-27 (2002). Jennings committed an execution-style murder of a police officer, shooting him four times in the head, while attempting to rob a pornographic video arcade. Add to that Jennings's criminal past, *see Jennings v. Stephens,* 2013 WL 3787589, at *1, there is no reasonable probability that his background evidence creates a substantial likelihood of a

different result.

Second, as discussed, the evidence that Jennings claims should have been presented to the jury was double-edged. *See Pinholster*, 131 S. Ct. at 1410. As this Court has explained, "[i]n evaluating [the prejudice] question, it is necessary to consider *all* the relevant evidence that the jury would have had before it if [defense counsel] had pursued the different path—not just the mitigation evidence [defense counsel] could have presented, but also the [State's rebuttal] evidence that almost certainly would have come in with it." *Belmontes*, 558 U.S. at 20. Carla's testimony could have opened the door to even more damaging evidence. Accordingly, Jennings cannot show a substantial probability that the jury would have reached a different result had his lawyers presented evidence of his troubled background.

III. The Fifth Circuit Committed No Error in Concluding Jennings Waived A Prejudice Argument Based Upon *Penry II*.[3] (Issue III)

Jennings complains the Fifth Circuit erred in holding that the federal doctrine of waiver precluded the federal habeas court from considering an argument initially made in a footnote in a state court brief. Petition at 34-37. Jennings asks for certiorari review and remand to the Fifth Circuit for consideration of the argument. However, the Fifth Circuit committed no error in concluding this argument was waived and, regardless, the argument itself is meritless.

This Court issued *Penry I* between the time that Jennings's jury was selected and when it was sworn in. *Ex parte Jennings*, 2008 WL 5049911, *7. Trial counsel thus requested and received a "nullification instruction" to allow the jury to consider mitigation evidence. While Jennings's state habeas application was pending, this Court decided *Penry II*, holding that similar instructions were insufficient to cure Eighth Amendment problems with the Texas special issues. *Id.*

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[3] *Penry v. Johnson*, 532 U.S. 782 (2001) (*Penry II*)

Jennings thus filed a supplemental habeas application raising an Eighth Amendment *Penry* claim on the evidence admitted at trial. SHCR 59-63. The CCA requested additional briefing on the *Strickland* claims, as well as whether the trial court erred in attempting to satisfy the Eighth Amendment dictates of *Penry I*. *Ex parte Jennings*, 2008 WL 5049911 at *1. In this supplemental briefing, in a footnote near the end of his pleading, Jennings argued:

> Had [Jennings's] counsel introduced mitigating evidence of his mental impairment and disadvantaged background, and thereafter objected to the nullification instruction, this Court would be obligated to reverse the death sentence pursuant to [*Abdul-Kabir*, *Smith*, and *Brewer*]. However, the jury could consider and give effect to [Jennings's] mitigating evidence of good behavior while confined in jail in answering the future dangerousness special issue. *See Franklin v. Lynaugh*, 487 U.S. 164 (1988). Thus, the nullification instruction was superfluous under controlling Supreme Court precedent because counsel did not present and, thus, the jury was not called upon to consider and give effect to the mitigating evidence of [Jennings's] mental impairment and disadvantaged background. In short, *Penry II* is not applicable.

Applicant's Brief, at 31 n.25; *Jennings v. Stephens*, 2013 WL 3787589, at *10. The CCA concluded that it "need not decide whether [Jennings] has waived or invited any *Penry* error by requesting a nullification instruction" because no *Penry* error occurred in his trial. *Ex parte Jennings*, 2008 WL 5049911, at *7.

Before the federal district court, Jennings argued—now in the body of his brief—that the state court should have factored the nullification instruction and subsequent Supreme Court authority overruling the instruction into its *Strickland* prejudice analysis. USCA5 42-43. But the district court dismissed the argument as an attempt to bring an unexhausted and procedurally defaulted Eighth Amendment *Penry* claim regarding mitigating evidence *not presented* at trial. *See Jennings*, 2012 WL 1440387, at *7.

The Fifth Circuit concluded that the *Penry*-based prejudice argument was now waived because, by raising it only in a footnote, Jennings did not provide the

CCA with a fair opportunity to consider the substance of the argument. *Jennings v. Stephens*, 2013 WL 3787589, at *10 (citing *Bridas SAPIC v. Gov't of Turkm.*, 345 F.3d 347, 356 n.7 (5th Cir. 2003)). The court held that "[t]his argument only vaguely alerted the state habeas court to his *Penry*-based prejudice argument and focused instead on arguing that *Penry II* is not applicable. This passing reference to his *Penry*-based prejudice argument during his state habeas proceedings does not suffice to exhaust his claim." *Id.* at *11. And because the claim was unexhausted and procedurally defaulted, the court of appeals held that Jennings could not rely on it to establish prejudice on his *Strickland* claim. *Id.*

Jennings argues that his argument was not waived because the CCA addressed it "in passing." Petition at 36. However, the CCA's opinion, concluding there was no Eighth Amendment deficiency, addresses the *Penry* claim raised in Jennings's supplemental petition, not his prejudice argument raised in a footnote at the end of his *Strickland* arguments, in which he ultimately concedes there was no *Penry* error. *See Ex parte Jennings*, 2008 WL 5049911, at *7-8. Jennings never stated that this argument weighed in favor of a prejudice determination. And the CCA does not mention the *Penry* argument at all in the context of his *Strickland* claims. *See id.* at *2-7. Given that Jennings also raised an Eighth Amendment claim, the Fifth Circuit rightly noted that his footnote "only vaguely alerted" the state court to a potential prejudice argument apart from the Eighth Amendment claim. *Jennings v. Stephens*, 2013 WL 3787589, at *11.

Jennings complains that the Fifth Circuit erred in relying on *Bridas* because it involves the Federal Rules of Appellate Procedure, which do not apply to Texas appellate briefs. Petition at 35-36. However, the applicable Texas Rule of Appellate Procedure and the federal rule are quite similar.[4] Both rules possess the same

[4] *Compare* Tex. R. App. Proc. 38.1(i) ("The brief must contain a clear and concise

requirements that petitioner provide argument in support of his contentions, with citation to authority and the record. Neither rule addresses claims raised in a footnote. Jennings admits that, "[u]nder Texas law, a ground for relief raised in a footnote, without citation to authority, is inadequately briefed and will not be considered on appeal." Petition at 36 (citing *Penry v. State,* 903 S.W.2d 715, 765 (Tex. Crim. App. 1995)). But he provides no authority to support his conclusion that an argument raised only in a footnote, *with* citation to authority, sufficiently exhausts the argument in state court. Because he cites no contrary state authority, and given the similarity of the state and federal rules, Jennings fails to demonstrate that the Fifth Circuit erred in concluding this argument was waived.

Regardless, the *Penry* issue is irrelevant to the prejudice inquiry. Jennings insists that the CCA should have factored this issue into its prejudice analysis, arguing that "had trial counsel presented mitigating evidence of [Jennings's] mental impairment or disadvantaged background, any death sentence would have been reversed based on the nullification instruction that the jury received in violation of [*Penry I* and *Penry II*]." Petition at 34. This position is insupportable because it suggests the state should consider the likely impact of trial counsel's performance on the outcome of his *appellate* proceedings. However, prejudice is determined by contemplating whether counsel's error had any effect on the proceedings in which it was made. What might happen later on appeal as a result of decisions not yet announced by this Court is irrelevant to this inquiry.

Furthermore, *Penry* claims must be reviewed on the basis of evidence actually presented at trial, not evidence that *could* have been presented. *See Ex parte Jennings,* 2008 WL 5049911, at *8 (citing *Ex parte Kunkle,* 852 S.W.2d 499,

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argument for the contentions made, with appropriate citations to authorities and to the record[.]") *with* Fed. R. App. Proc. 28(a)(8)(A) (requiring appellant's argument to contain "appellant's contentions and the reasons for them, with citation to the authorities and parts of the record on which the appellant relies")

504 (Tex. Crim. App. 1993; *Miniel v. Cockrell*, 339 F.3d 331, 338 (5th Cir. 2003)). If Jennings raised an Eighth Amendment *Penry* claim based upon evidence not presented at trial, the claim would be foreclosed by state and Fifth Circuit precedent. Jennings should not be permitted to circumvent this law by raising this argument as part of a *Strickland* prejudice claim. Federal habeas relief is not available for this claim, and this Court need not grant certiorari.

IV. The Fifth Circuit Committed No Error in Dismissing Jennings's Cross-Appeal. (Issue IV)

Jennings complains that the Fifth Circuit erred in dismissing his cross-point because he did not file a separate notice of appeal or motion for COA. Jennings argues that he did not need to file such appeal because the court acquired jurisdiction over his entire *Strickland* claim as a result of the Respondent's appeal. Petition at 37-39. The Fifth Circuit committed no error.

The district granted habeas relief to Jennings on two ineffective-assistance-of-counsel claims, but denied relief on a third, and did not sua sponte grant COA. The Director appealed on the two claims for which relief was granted. Jennings did not timely cross-appeal or seek COA from the Fifth Circuit on any of the rejected claims, as required by 28 U.S.C. § 2253(c). But when Jennings responded to the Director's appellant's brief, he raised a cross-point, arguing that the district court erred in upholding the state court decision on a third claim—that trial counsel was ineffective during the punishment-phase summation. Brief for Appellee, at 51-53. In his reply brief, the Director countered that the "cross-point" was improper and meritless because Jennings had not sought COA, and the Fifth Circuit lacked jurisdiction to consider the claim. Reply, at 27-28; *see Gonzales*, 132 S. Ct. at 649. Jennings responded that, because the district court granted relief on the basis of ineffective assistance of counsel, the Court could consider any aspect of his *Strickland* claim rejected by the district court. *See* Appellee's Supplemental

Authority, filed March 27, 2013. While noting a split in the circuits, the Fifth Circuit adhered to its controlling authority, holding that Jennings "must advance arguments establishing jurisdiction." *Jennings v. Stephens*, 2013 WL 3787589, at *12; *see Hargrave v. Fibreboard Corp.*, 710 F.2d 1154, 1159 (5th Cir. 1983).

Jennings now complains that the rule requiring a separate notice of appeal and motion for COA should not apply where a petitioner raises one ground of ineffective assistance of counsel with multiple allegations of deficient performance, but the district court grants relief on some but not all allegations. Jennings argues that if the respondent appeals the district court's determination, the petitioner should not need to file a separate notice of appeal and motion for COA to seek review of the rejected allegation; rather, the appellate court acquires jurisdiction over the entire claim as a result of the respondent's notice of appeal. Jennings cites no authority in support of the proposition, but asks this Court to grant certiorari to resolve the circuit split on the jurisdictional issue identified by the Fifth Circuit.

This Court need not grant certiorari review to resolve a circuit split. It appears that only the Seventh Circuit holds that an additional COA is unnecessary where an appeal is already before the court of appeals on the state's appeal of a grant of habeas relief. *Szabo v. Walls*, 313 F.3d 392, 397-98 (7th Cir. 2002). However, *Szabo* relies on the conclusion that no other court has demanded that a prisoner obtain COA in order to present an extra issue in a case already before the court. *Id.* But in reaching this conclusion, *Szabo* acknowledges contrary opinions from two other circuits which assume, without discussing the issue, that COA is needed for a prisoner's cross-appeal, and considers that assumption "a plausible understanding of § 2253(c)." *Id.* at 397-98 (citing *Ainsworth v. Woodford*, 268 F.3d 868, 873 (9th Cir. 2001) (granting cross-appeal request for COA, consistent with *Slack v. McDaniel*, 529 U.S. 473 (2000)); *Williams v. Cain*, 125 F.3d 269, 273 (5th

Cir. 1997) (state timely appealed grant of habeas relief, and circuit court granted Williams's request for COA on rejected claims but limited COA to those claims)).

The Fifth Circuit, however, has since determined that a petitioner *must* seek COA for cross-appeal claims. *See Wiley v. Epps*, 625 F.3d 199, 204 n.2 (5th Cir. 2010) (although district court denied habeas relief on additional claim challenging conviction, petitioner-appellee did not file notice of appeal or seek COA; thus, only issue on appeal is that on which the district court granted relief). And the Second Circuit holds that, "a habeas petitioner to whom the writ has been granted on one or more grounds may not assert, in opposition to an appeal by the state, any ground that the district court has not adopted unless the petitioner obtains a [COA] permitting him to argue that ground." *Jennings v. Stephens*, 2013 WL 3787589, *11 (citing *Grotto v. Herbert*, 316 F.3d 198, 209 (2nd Cir. 2003)). *Grotto* relies on an Eighth Circuit decision, dismissing a petitioner's cross-appeal and considering only the state's appeal where COA was previously denied by another panel. *Fretwell v. Norris*, 133 F.3d 621, 623 (8th Cir. 1998). Thus, the Seventh Circuit opinion appears to be an anomaly among the circuits, and relies on a premise no longer supported—that no other court demands that a prisoner seek COA in order to cross-appeal.

Furthermore, requiring a petitioner to seek COA before he may cross-appeal is not contrary to the law of this Court. *Szabo* relies on two Supreme Court cases to support a conclusion that an appellant may defend his judgment on any ground properly preserved in the district court. *See* 313 F.3d at 397 (citing *Massachusetts Mutual Life Insurance Co. v. Ludwig*, 426 U.S. 479, 480-81 (1976); *El Paso Natural Gas Co. v. Neztsosie*, 526 U.S. 473, 479 (1999)). But neither of those cases is a federal-habeas case, and therefore, neither had occasion to consider the COA's special "gatekeeping" function. *Gonzales*, 132 S. Ct. at 650. Prisoners—unlike other litigants in private litigation—must seek and receive COA before filing their claims.

See id. That crucial distinction means that cases like *Mass Mutual* and *El Paso* are inapposite. And in all events, these cases actually support a strict application of the cross-appeal requirement—one in line with the majority circuits.

Mass. Mutual involved a contract dispute over the denial of payment of liability insurance benefits under a double indemnity provision; the administrator of an estate sued in the district court, which held that the law of Michigan (where the insurance contract was obtained) applied over the law of Illinois (where the accident occurred), and thus agreed that the insurer was only liable for ordinary benefits. 426 U.S. at 479-80. The administrator appealed to the Seventh Circuit where the insurer argued that the district court's application of Michigan law was correct but, alternatively, the outcome would be the same under Illinois substantive law. The Seventh Circuit held that the insurer was precluded from arguing in the alternative because he had not cross-appealed. *Id.* at 480. This Court disagreed, finding the decision "plainly at odds with the 'inveterate and certain' rule":

> It is true that a party who does not appeal from a final decree of the trial court cannot be heard in opposition thereto when the case is brought here by the appeal of the adverse party. In other words, the appellee may not attack the decree with a view either to enlarging his own rights thereunder or of lessening the rights of his adversary, whether what he seeks is to correct an error or to supplement the decree with respect to a matter not dealt with below. But it is likewise settled that the appellee may, without taking a cross-appeal, urge in support of a decree any matter appearing in the record, although his argument may involve an attack upon the reasoning of the lower court or an insistence upon matter overlooked or ignored by it.(Footnote omitted.)

Id. at 480-81 (citing *United States v. American Ry. Exp. Co.*, 265 U.S. 425, 435 (1924)). This Court concluded that the insurer's alternative argument "was no more than 'an attack upon the reasoning of the lower court,' and as such required no cross-appeal." *Id.* at 481. This is so because the insurer argued that the original decree denying double indemnity benefits was correct under either Illinois or

Michigan law, and did not ask for relief beyond enforcement of the original decree.

In *El Paso Natural Gas Co*, this Court held that the Ninth Circuit erred in addressing issues upon which the respondents did not seek cross-appeal. 526 U.S. at 479. The defendant-appellants in a multiparty lawsuit filed suit in district court, seeking to enjoin the plaintiff-respondents from pursuing their claims in the Tribal Courts. The district court denied preliminary injunctions "except to the extent" that the plaintiff-respondents sought relief in the Tribal Courts under the Price-Anderson Act. *Id.* at 478-79. But the district court declined to decide whether the Act applied to the claims brought by the plaintiff-respondents, leaving those determinations to the Tribal Courts in the first instance. *Id.* at 478. The defendant-appellants appealed. *Id.* The Ninth Circuit affirmed the district court's decisions declining to enjoin the plaintiff-respondents from pursuing non-Price-Anderson Act claims, as well as the decision to allow the Tribal Courts to decide in the first instance whether the plaintiff-respondents' tribal claims fell within the ambit of the Price-Anderson Act. *Id.* The Ninth Circuit then went a step further: Despite the fact that the plaintiff-respondents did not appeal the partial injunctions against them, the Ninth Circuit sua sponte addressed the district court rulings, citing "important comity considerations involved." *Id.* The court then reversed as to the injunctions, holding that the Act contains no "express jurisdictional prohibition" barring the Tribal Court from determining its jurisdiction over Price-Anderson Act claims. *Id.* at 478-79. The Ninth Circuit thus decided, without the benefit of cross-appeal, an issue in favor of the non-appealing party that had additional consequences to the appealing party.

This Court vacated and remanded the Ninth Circuit decision, holding that, because the plaintiff-respondents did not appeal the injunctions, the issue was not properly before the Ninth Circuit, which consequently erred in addressing it. *Id.* at

479. Because the plaintiff-respondents failed to cross-appeal, they could not "attack the [district court's] decree with a view either to enlarging [their] own rights thereunder or of lessening the rights of [their] adversary." *Id.* (citing *American Ry. Exp. Co.*, 265 U.S. at 435). This Court stated that, "in more than two centuries of repeatedly endorsing the cross-appeal requirement, not a single one of our holdings has ever recognized an exception to the rule." *Id.* at 480.

Jennings attempted to raise an issue without first giving notice to the opposing party or the court by seeking COA. Thus, his case is more akin to *El Paso*, where the lower court improperly granted relief on a separate ruling despite the lack of cross-appeal by the appellees, versus *Mass. Mutual,* where the appellee simply made an alternative argument in favor of the lower court's judgment that was on appeal. The *El Paso* decision made clear that the cross-appeal requirement "is meant to protect institutional interests in the orderly functioning of the judicial system, by putting opposing parties and appellate courts on notice of the issues to be litigated and encouraging repose of those that are not." 526 U.S. at 481-82. Thus, allowing a respondent—as *Szabo* did and Jennings now urges—to raise *any issue* in his appellee's brief, without prior notice to the appellant of the need to address the claim at the outset would fly in the face of the "orderly functioning of the judicial system" that the cross-appeal requirement was meant to protect.

In this case, the district court's decree entitled Jennings to relief on two of the three independent *Strickland* claims. The district court decreed that the third claim did not entitle Jennings to relief and Jennings did not appeal this decision. Therefore, Jennings may only defend the determination of the district court on those two claims which the Director appealed. Nothing in this Court's precedent suggests that he may reurge a separate claim upon which the court decreed he was *not* entitled to relief to support the district court's decree that he was entitled to

relief. As in *El Paso,* allowing Jennings to raise a separate rejected issue, without proper notice through motion for cross-appeal, would improperly serve to either "[enlarge] his own rights" or "[lessen] the rights of his adversary." 526 U.S. at 479; *see also Mass. Mutual.*, 426 U.S. at 480-81.

Furthermore, the appellate court did not err in refusing to consider the three independent *Strickland* allegations as one multi-part claim, as Jennings suggests. Petition at 38. Jennings briefed the rejected issue, not as a part of one, multi-part *Strickland* claim, but as a separate "cross-point." *See* Appellee's Brief, at 51.

Furthermore, while Jennings urged the Fifth Circuit panel to find that trial counsel performed deficiently in closing arguments, and to "consider this deficiency in performance in determining prejudice," Appellee's Brief at 53, this alleged deficiency had no bearing on the prejudice determination of the other allegations of deficiency. The two allegations upon which the district court granted relief involved trial counsel's failure to present mitigating evidence. A prejudice determination regarding counsel's failure to investigate and present mitigating evidence requires the reviewing court to "reweigh the evidence in aggravation against the totality of available mitigating evidence[,]" including that adduced at trial, as well as the habeas proceeding. *Wiggins*, 539 U.S. at 534. Thus, the lower federal courts were required to consider *all* mitigating evidence proffered in the first two issues together, when analyzing prejudice for both independent claims. However, trial counsel's closing argument—the subject of the third claim—is not evidence, and has no bearing on the prejudice analysis of the other claims. Thus, it is reviewed separately. Because the cross-appeal issue involved a separate instance of trial counsel's conduct, it was an independent claim and the Fifth Circuit committed no error in dismissing for lack of jurisdiction.

CONCLUSION

For the foregoing reasons, this Court should deny certiorari review.

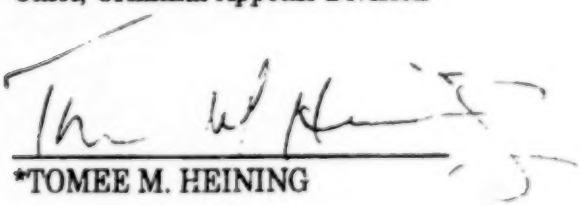
Respectfully submitted,

GREG ABBOTT
Attorney General of Texas

DANIEL T. HODGE
First Assistant Attorney General

DON CLEMMER
Deputy Attorney General for Criminal Justice

EDWARD L. MARSHALL
Chief, Criminal Appeals Division



*TOMEE M. HEINING

*Counsel of Record

Assistant Attorney General
Office of the Attorney General
Criminal Appeals Division
P. O. Box 12548, Capitol Station
Austin, Texas 78711-2548
Telephone: (512) 936-1600
Telecopier: (512) 320-8132

ATTORNEYS FOR RESPONDENT

No. 11-10609

IN THE
SUPREME COURT OF THE UNITED STATES

ROBERT MITCHELL JENNINGS,
Petitioner,

v.

WILLIAM STEPHENS, Director,
Texas Department of Criminal Justice,
Institutional Division,
Respondent.

On Petition for Writ of Certiorari
To the United States Court of Appeals
For the Fifth Circuit

PROOF OF SERVICE

I hereby certify that on the 3rd day of February 2014, one copy of Respondent's Brief in Opposition was mailed, postage prepaid, to Mr. Randolph L. Schaffer, Jr., 1301 McKinney, Suite 3100, Houston, Texas 77010. All parties required to be served have been served. I am a member of the Bar of this Court.

*TOMEE M. HEINING
Assistant Attorney General
Office of the Attorney General
Criminal Appeals Division

* Counsel of Record

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ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

February 3, 2014

VIA OVERNIGHT MAIL
Hon. Scott S. Harris, Clerk
United States Supreme Court
Office of the Clerk
1 First St., N.E.
Washington, D.C. 20543

Re: *Robert Mitchell Jennings v. William Stephens*, No. 11-10609

Dear Mr. Harris:

Enclosed for filing with the papers in the above styled cause are the original and nine copies of **Respondent Stephens's Brief in Opposition to Petition for Writ of Certiorari**. Also enclosed is the Proof of Service Form. Please indicate the date of filing on the enclosed copy of this letter and return it to me in the post-paid envelope provided.

By copy of this letter, I am forwarding a copy of said brief to counsel for Petitioner. Thank you for your kind assistance in this matter.

Yours truly,

s/ Tomee M. Heining
TOMEE M. HEINING
Assistant Attorney General
Criminal Appeals Division
(512) 936-1600

TMH/ga
Enclosures
c: Randolph L. Schaffer, Jr.
1301 McKinney, Suite 3100
Houston, Texas 77010

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JOINT APPENDIX

No. 13-7211

In The
Supreme Court of the United States

ROBERT MITCHELL JENNINGS,

Petitioner,

v.

WILLIAM STEPHENS, DIRECTOR,
TEXAS DEPARTMENT OF CRIMINAL JUSTICE,
CORRECTIONAL INSTITUTIONS DIVISION,

Respondent.

**On Writ Of Certiorari To The
United States Court Of Appeals
For The Fifth Circuit**

JOINT APPENDIX

RANDOLPH L. SCHAFFER, JR.
Counsel of Record
1301 McKinney, Suite 3100
Houston, Texas 77010
(713) 951-9555
noguilt@swbell.net

Counsel for Petitioner

TOMEE M. HEINING
Counsel of Record
P.O. Box 12548
Capitol Station
Austin, Texas 78711
(512) 936-1600
tomee.heining@texas
attorneygeneral.gov

Counsel for Respondent

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Certiorari Granted March 24, 2014

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

TABLE OF CONTENTS

Page

Relevant Docket Entries from the United States District Court for the Southern District of Texas, No. 4:09-cv-00219 1

Relevant Docket Entries from the United States Court of Appeals for the Fifth Circuit, No. 12-70018 6

Memorandum and Order of the United States District Court for the Southern District of Texas (filed April 23, 2012) 16

Final Judgment of the United States District Court for the Southern District of Texas (filed April 23, 2012) 35

Respondent Thaler's Notice Of Appeal in the United States District Court for the Southern District of Texas (filed May 17, 2012) 36

Motion To Issue A Certificate Of Appealability (filed November 29, 2012) 38

Opinion of the United States Court of Appeals for the Fifth Circuit (filed July 22, 2013) 41

Judgment of the United States Court of Appeals for the Fifth Circuit (filed July 22, 2013) 69

Order Denying Petition For Rehearing (filed August 15, 2013) 71

Certiorari and Motion to Proceed *in forma pauperis* Granted by the United States Supreme Court (March 24, 2014) 73

U.S. District Court
SOUTHERN DISTRICT OF TEXAS (Houston)
CIVIL DOCKET FOR CASE #: 4:09-cv-00219

Jennings v. Thaler
Assigned to: Judge Lynn N. Hughes
Cause: 28:2254 Petition for Writ of Habeas Corpus(Death Penalty)

Date Filed	#	Docket Text
01/27/2009	1	PETITION for Writ of Habeas Corpus filed by Robert Mitchell Jennings.(Schaffer, Randy) (Entered: 01/27/2009)
01/27/2009	2	MOTION for Appointment of Counsel by Robert Mitchell Jennings, filed. Motion Docket Date 2/17/2009. (Attachments: # 1 Affidavit In Support Of Motion For Leave To Proceed In Forma Pauperis)(Schaffer, Randy) (Entered: 01/27/2009)
02/06/2009	3	Order for Appointment of Counsel re 2 Motion to Appoint Randy Schaffer and for leave to proceed in forma pauperis.(Signed by Judge Lynn N. Hughes) Parties notified.(sbyrum,) (Entered: 02/10/2009)
02/19/2009	4	NOTICE of Appearance by Tina J. Miranda on behalf of Nathaniel Quarterman, filed. (Miranda, Tina) (Entered: 02/19/2009)
02/12/2010	5	Scheduling ORDER: Thaler must answer the petition and move for

		summary judgment by 4/20/2010. Jennings may respond through June 20, 2010. (Signed by Judge Lynn N. Hughes) Parties notified.(ghassan,) (Entered: 02/14/2010)
04/20/2010	6	ANSWER to Complaint by Rick Thaler, filed. (Attachments: # 1 Proposed Order)(Miranda, Tina) (Entered: 04/20/2010)
05/21/2010	7	RESPONSE to 6 Answer to Complaint, filed by Robert Mitchell Jennings. (Schaffer, Randy) (Entered: 05/21/2010)
07/22/2010	8	Letter from Tina J. Miranda re: State Court Records on Diskette, filed. CD forwarded to file room. (dcartmill) (Entered: 07/22/2010)
09/28/2011	9	NOTICE of Appearance by Ellen Stewart-Klein on behalf of Rick Thaler, filed. (Stewart-Klein, Ellen) (Entered: 09/28/2011)
04/23/2012	10	MEMORANDUM AND ORDER granting 1 Jenning's Petition for a Writ of Habeas Corpus. Thaler shall release Jennings from custody unless, within 120 days, the State of Texas grants Jennings a new sentencing hearing or resentences him to a term of imprisonment as provided by Texas law at the time of Jenning's crime; and this Order is stayed until all post-judgment motions and appeals are final or the

		time to file such motions and appeals expires denying. Thaler's Motion for Summary Judgment 6 is denied.(Signed by Judge Lynn N. Hughes) Parties notified. (chorace) (Entered: 04/25/2012)
04/23/2012	11	FINAL JUDGMENT, Case terminated on April 23, 2012.(Signed by Judge Lynn N. Hughes) Parties notified.(chorace) (Entered: 04/25/2012)
05/17/2012	12	NOTICE OF APPEAL to US Court of Appeals for the Fifth Circuit re: 11 Final Judgment, 10 Memorandum and Order, by Rick Thaler (Filing fee $ 455, receipt number 0541-9752931), filed.(Stewart-Klein, Ellen) (Entered: 05/17/2012)
05/18/2012	13	Notice of the Filing of an Appeal. DKT13 transcript order form was not mailed to appellant. Fee status: Paid. The following Notice of Appeal and related motions are pending in the District Court: 12 Notice of Appeal, filed. (Attachments: # 1 NOA, # 2 Memorandum, # 3 Judgment, # 4 Docket sheet)(smurdock,) (Entered: 05/18/2012)
05/18/2012		Electronic record on appeal certified to the Fifth Circuit Court of Appeals re: 12 Notice of Appeal USCA No. 12-70018, filed.(smurdock,) (Entered: 05/18/2012)

05/21/2012	14	Transmittal Letter on Appeal Certified re: 12 Notice of Appeal. A paper copy of the electronic record is being transmitted to the Fifth Circuit Court of Appeals in 1 volume. Emails containing the electronic record are being sent to counsel. (USCA No. 12-70018), filed. (Attachments: # 1 Schaeffer letter, # 2 Marshall letter, #3 Klein letter)(smurdock,). Modified on 5/21/2012 (smurdock,). UPS # 1Z7262750348922654 Modified on 5/23/2012 (smurdock,). (Entered: 05/21/2012)
05/29/2012	15	DKT-13 TRANSCRIPT ORDER FORM by Andrew S. Oldham. No hearings.. This order form relates to the following: 12 Notice of Appeal, filed.(kcraig,) (Entered: 05/29/2012)
06/07/2012	16	NOTICE of Receipt of Record on Appeal from US Court of Appeals for the Fifth Circuit re: 12 Notice of Appeal (USCA No. 12-70018), filed.(hler,) (Entered: 06/07/2012)
09/10/2013	17	PER CURIAM of USCA re: 12 Notice of Appeal; USCA No. 12-70018. Jennings "cross-point" is DISMISSED and his motion for a COA is DENIED. The Judgment granting habeas relief is REVERSED and Judgment is RENDERED, DENYING habeas relief,

		filed. (Attachments: # cover letter) (rnieto, 1) (Entered: 09/10/2013)
09/10/2013	18	Order of USCA re: 12 Notice of Appeal; USCA No. 12-70018. Judgment of the District Court granting habeas relief is reversed and rendered, denying habeas relief, filed. (rnieto, 1) (Entered: 09/10/2013)
03/31/2014	19	The petition for a writ of certiorari filed with the Supreme Court has been granted limited to Question 4 presented by the petition (USCA No. 12-70018) (USSC No. 13-7211), filed.(mperez, 1) (Entered: 04/01/2014)

General Docket
United States Court of Appeals
for the 5th Circuit

ROBERT MITCHELL JENNINGS,

Petitioner-Appellee

v.

WILLIAM STEPHENS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION,

Respondent-Appellant

05/17/2012	DEATH PENALTY CASE docketed. NOA filed by Appellant Mr. Rick Thaler, Director, Texas Department of Criminal Justice, Correctional Institutions Division [12-70018] (MRW)
05/17/2012	CJA APPOINTMENT for Attorney Mr. Randolph Lee Schaffer, Jr. for Mr. Robert Mitchell Jennings. A voucher will not issue at this time. Counsel must download a voucher from the website at disposition of the case. Please see the attached document for further guidance. ORIGINATING COURT DISTRICT: STX ORIGINATING CASE NUMBER: 4:09-CV-219 DEFENDANT NUMBER: 1 DATE OF APPOINTMENT: 05/17/2012 [12-70018] (MRW)
05/17/2012	INITIAL CASE CHECK by Attorney Advisor complete, Action: Case OK to Process. [7090509-2] Initial AA Check

	Due satisfied.. ROA due on 06/01/2012 [12-70018] (MRW)
05/23/2012	APPEARANCE FORM FILED by Attorney(s) Andrew S. Oldham for party(s) Appellant Rick Thaler, Director, Texas Department of Criminal Justice, Correctional Institutions Division, in case 12-70018 [12-70018] (MRW)
05/25/2012	RECORD ON APPEAL FILED. Electronic Pleadings, 1; ROA deadline satisfied.. State Court Papers due on 06/11/2012. [12-70018] (MRW)
06/07/2012	STATE COURT PAPERS FILED. Exhibits, 2 Boxes State Court Papers. State Court Papers deadline satisfied. [12-70018] (MRW)
06/07/2012	BRIEFING NOTICE ISSUED A/Pet's Brief Due on 07/17/2012 for Appellant Rick Thaler, Director, Texas Department of Criminal Justice, Correctional Institutions Division. [12-70018] (MRW)
07/09/2012	PHONE EXTENSION CONFIRMED for Appellant Mr. Rick Thaler, Director, Texas Department of Criminal Justice, Correctional Institutions Division. Extension granted to and including 08/16/2012. A/Pet's Brief deadline updated to 08/16/2012 for Appellant Rick Thaler, Director, Texas Department of Criminal Justice, Correctional Institutions Division [12-70018] (MFY)
08/01/2012	UNOPPOSED MOTION filed by Appellant Mr. Rick Thaler, Director, Texas

	Department of Criminal Justice, Correctional Institutions Division to extend time to file brief as appellant until 08/31/2012 at 11:59 pm [7149665-2]. Date of service: 08/01/2012 via email – Attorney for Appellants: Oldham, Stewart-Klein; Attorney for Appellee: Schaffer [12-70018] (Andrew S. Oldham)
08/02/2012	CLERK ORDER granting motion to extend time to file appellant's brief filed by Appellant Mr. Rick Thaler, Director, Texas Department of Criminal Justice, Correctional Institutions Division [7149665-2] A/Pet's Brief deadline updated to 08/31/2012 for Appellant Rick Thaler, Director, Texas Department of Criminal Justice, Correctional Institutions Division. [12-70018] (MRW)
08/31/2012	APPELLANT'S BRIEF FILED by Mr. Rick Thaler, Director, Texas Department of Criminal Justice, Correctional Institutions Division Date of service: 08/31/2012 via email – Attorney for Appellants: Oldham, Stewart-Klein; Attorney for Appellee: Schaffer [12-70018] REVIEWED AND/OR EDITED. # of Copies Provided: 0 A/Pet's Brief deadline satisfied. Appellee's Brief due on 10/03/2012 for Appellee Robert Mitchell Jennings. Paper Copies of Brief due on 09/10/2012 for Appellant Rick Thaler, Director, Texas Department of Criminal Justice, Correctional Institutions Division. [12-70018] (Andrew S. Oldham)

08/31/2012	RECORD EXCERPTS FILED by Appellant Mr. Rick Thaler, Director, Texas Department of Criminal Justice, Correctional Institutions Division. Date of service: 08/31/2012 via email – Attorney for Appellants: Oldham, Stewart-Klein; Attorney for Appellee: Schaffer [12-70018] REVIEWED AND/OR EDITED.. # of Copies Provided: 0 Paper Copies of Record Excerpts due on 09/10/2012 for Appellant Rick Thaler, Director, Texas Department of Criminal Justice, Correctional Institutions Division. [12-70018] (Andrew S. Oldham)
09/06/2012	Paper copies of appellant brief filed by Appellant Mr. Rick Thaler, Director, Texas Department of Criminal Justice, Correctional Institutions Division in 12-70018 received. Paper copies match electronic version of document? Yes # of Copies Provided: 7. Paper Copies of Brief due deadline satisfied. [12-70018] (MRW)
09/06/2012	Paper copies of record excerpts filed by Appellant Mr. Rick Thaler, Director, Texas Department of Criminal Justice, Correctional Institutions Division in 12-70018 received. Paper copies match electronic version of document? Yes # of Copies Provided: 4. Paper Copies of Record Excerpts due deadline satisfied. [12-70018] (MRW)
09/12/2012	UNOPPOSED MOTION filed by Appellee Mr. Robert Mitchell Jennings to

extend the time to file appellee's brief [7171212-2] in 12-70018 until 11/02/2012 at 11:59 pm [7179361-2]. Date of service: 09/12/2012 via US mail – Attorney for Appellants: Oldham, Stewart-Klein; clerk – Attorney for Appellants: Oldham, Stewart-Klein; hand delivery – Attorney for Appellee: Schaffer [12-70018] (Randolph Lee Schaffer Jr.)

09/12/2012 CLERK ORDER granting motion to extend time to file appellee's brief filed by Appellee Mr. Robert Mitchell Jennings [7179361-2] Appellee's Brief due on 11/02/2012 for Appellee Robert Mitchell Jennings. [12-70018] (MRW)

10/26/2012 APPELLEE'S BRIEF FILED by Appellee Mr. Robert Mitchell Jennings Date of service: 10/26/2012 via email – Attorney for Appellants: Oldham, Stewart-Klein; Attorney for Appellee: Schaffer [12-70018] REVIEWED AND/OR EDITED. APPELLEE'S BRIEF FILED # of Copies Provided: 0 E/Res's Brief deadline satisfied. Reply Brief due on 11/13/2012 for Appellant Rick Thaler, Director, Texas Department of Criminal Justice, Correctional Institutions Division. Paper Copies of Brief due on 10/31/2012 for Appellee Robert Mitchell Jennings. [12-70018] (Randolph Lee Schaffer Jr.)

10/29/2012 UNOPPOSED MOTION filed by Appellant Mr. Rick Thaler, Director, Texas Department of Criminal Justice, Correctional Institutions Division to extend

time to file reply brief until 11/27/2012 at 11:59 pm [7216060-2]. Date of service: 10/29/2012 via email – Attorney for Appellants: Oldham, Stewart-Klein; Attorney for Appellee: Schaffer [12-70018] (Andrew S. Oldham)

10/30/2012 CLERK ORDER granting motion to extend time to file reply brief filed by Appellant Mr. Rick Thaler, Director, Texas Department of Criminal Justice, Correctional Institutions Division [7216060-2] Reply Brief deadline updated to 11/27/2012 for Appellant Rick Thaler, Director, Texas Department of Criminal Justice, Correctional Institutions Division. [12-70018] (MRW)

10/31/2012 Paper copies of appellee brief filed by Appellee Mr. Robert Mitchell Jennings in 12-70018 received. Paper copies match electronic version of document? Yes # of Copies Provided: 7. Paper Copies of Brief due deadline satisfied. [12-70018] (MRW)

11/20/2012 CRIMINAL JUSTICE ACT 30 voucher received from Mr. Randolph Lee Schaffer, Jr. for Mr. Robert Mitchell Jennings.. Counsel should allow a minimum of 30 days for processing before inquiring about payment status. [12-70018] (JK)

11/27/2012 APPELLANTS REPLY BRIEF FILED by Mr. Rick Thaler, Director, Texas Department of Criminal Justice, Correctional Institutions Division Date of

	service: 11/27/2012 via email – Attorney for Appellants: Oldham, Stewart-Klein; Attorney for Appellee: Schaffer [12-70018] REVIEWED AND/OR EDITED. # of Copies Provided: 0 Reply Brief deadline satisfied. Paper Copies of Brief due on 12/03/2012 for Appellant Rick Thaler, Director, Texas Department of Criminal Justice, Correctional Institutions Division. [12-70018] (Andrew S. Oldham)
11/29/2012	MOTION filed by Appellee Mr. Robert Mitchell Jennings for certificate of appealability [7239594-2]. Date of service: 11/29/2012 via email – Attorney for Appellants: Oldham, Stewart-Klein; Attorney for Appellee: Schaffer [12-70018] REVIEWED AND/OR EDITED. MOTION for certificate of appealability [7239594-2]. [12-70018] (Randolph Lee Schaffer Jr.)
11/30/2012	Paper copies of appellant reply brief filed by Appellant Mr. Rick Thaler, Director, Texas Department of Criminal Justice, Correctional Institutions Division in 12-70018 received. Paper copies match electronic version of document? Yes # of Copies Provided: 7. Paper Copies of Brief due deadline satisfied. [12-70018] (MRW)
02/06/2013	CASE CALENDARED for oral argument on Monday, 03/25/2013, at 3:00 PM in Dallas. [12-70018] (GAM)

03/25/2013	ORAL ARGUMENT HEARD before Judges Stewart, Southwick, Haynes. Arguing Person Information Updated for: Andrew S. Oldham arguing for Appellant Director Thaler, Texas Department of Criminal Justice; Arguing Person Information Updated for: Randolph Lee Schaffer, Jr. arguing for Appellee Robert Mitchell Jennings [12-70018] (SME)
03/27/2013	SUPPLEMENTAL AUTHORITIES (FRAP 28j) FILED by Appellee Mr. Robert Mitchell Jennings Date of Service: 03/27/2013 [12-70018] (MRW)
03/28/2013	CRIMINAL JUSTICE ACT 30 voucher received from Mr. Randolph Lee Schaffer, Jr. for Mr. Robert Mitchell Jennings.. Counsel should allow a minimum of 30 days for processing before inquiring about payment status. [12-70018] (JK)
03/29/2013	RESPONSE/OPPOSITION filed by Mr. Rick Thaler, Director, Texas Department of Criminal Justice, Correctional Institutions Division [7328865-1] to the 28j letter filed by Appellee Mr. Robert Mitchell Jennings in 12-70018 [7326756-2] Date of Service: 03/29/2013 via email – Attorney for Appellants: Oldham, Stewart-Klein; Attorney for Appellee: Schaffer. [12-70018] (Andrew S. Oldham)
07/22/2013	UNPUBLISHED OPINION FILED. [12-70018 Reversed and Rendered] Judge: CES, Judge: LHS, Judge: CH.

	Mandate pull date is 08/12/2013; denying motion for certificate of appealability filed by Appellee Mr. Robert Mitchell Jennings [7239594-2] [12-70018] (JRC)
07/22/2013	JUDGMENT ENTERED AND FILED. [12-70018] (JRC)
07/30/2013	PETITION filed by Appellee Mr. Robert Mitchell Jennings for rehearing [7422916-2]. Date of Service: 07/30/2013 via email – Attorney for Appellants: Oldham, Stewart-Klein; Attorney for Appellee: Schaffer [12-70018] REVIEWED AND/OR EDITED. PETITION for rehearing [7422916-2] Number of Copies: 0. Mandate pull date canceled.. Paper Copies of Rehearing due on 08/05/2013 for Appellee Robert Mitchell Jennings.. Date of Service: 07/30/2013 [12-70018] (Randolph Lee Schaffer Jr.)
07/31/2013	Paper copies of petition for rehearing filed by Appellee Mr. Robert Mitchell Jennings in 12-70018 received. Paper copies match electronic version of document? Yes # of Copies Provided: 4. Paper Copies of Rehearing due deadline satisfied. [12-70018] (MRW)
08/15/2013	COURT ORDER denying petition for rehearing filed by Appellee Mr. Robert Mitchell Jennings [7422916-2] Mandate pull date is 08/22/2013 [12-70018] (MRW)

08/20/2013	CRIMINAL JUSTICE ACT 30 voucher received from Mr. Randolph Lee Schaffer, Jr. for Mr. Robert Mitchell Jennings.. Counsel should allow a minimum of 30 days for processing before inquiring about payment status. [12-70018] (JK)
08/23/2013	MANDATE ISSUED. Mandate pull date satisfied. [12-70018] (LBM)
11/06/2013	SUPREME COURT NOTICE that petition for writ of certiorari [7498584-2] was filed by Appellee Mr. Robert Mitchell Jennings on 10/28/2013. Supreme Court Number: 13-7211. [12-70018] (CAV)
11/26/2013	CRIMINAL JUSTICE ACT 30 voucher received from Mr. Randolph Lee Schaffer, Jr. for Mr. Robert Mitchell Jennings.. Counsel should allow a minimum of 30 days for processing before inquiring about payment status. [12-70018] (JK)
03/25/2014	SUPREME COURT ORDER received granting petition for writ of certiorari, limited to Question 4 presented by the petition. Filed by Appellee Mr. Robert Mitchell Jennings in 12-70018 on 03/24/2014. [7594184-1] [12-70018] (LGL)

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

ROBERT MITCHELL JENNINGS, Petitioner,	§	
v.	§	
RICK THALER, Director, Texas Department of Criminal Justice – Correctional Institutions Division, Respondent.	§	H-09-219

Memorandum and Order

(Filed Apr. 23, 2012)

Robert Mitchell Jennings filed a petition for a writ of habeas corpus. Rick Thaler moved for summary judgment. Thaler's motion is denied and Jennings' Petition is granted.

I. Background

The facts are not in dispute. Houston Police Officer Elston Howard was in the Empire Bookstore, a sexually oriented business, arresting the store clerk for violating a city ordinance. Jennings entered to rob the store. He shot Howard twice in the neck. Howard tried to leave the store, but collapsed on the floor. Jennings shot Howard two more times from behind. Howard died.

Jennings was convicted of capital murder. During the penalty phase of Jennings's trial, the State presented evidence of Jennings's extensive criminal history, including juvenile offenses, three aggravated robberies, and burglary of a habitation. Jennings also committed numerous prison disciplinary violations.

Jennings's only witness was a chaplain with the Harris County Sheriff's office. He testified that Jennings changed for the better during his pretrial detention.

The jury found that Jennings acted deliberately in killing Howard and that there was a probability that Jennings would commit future acts of criminal violence constituting a continuing threat to society. The trial court sentenced him to death. The Texas Court of Criminal Appeals ("TCCA") affirmed the sentence and conviction, *Jennings v. State,* No. AP-70,911 (Tex.Crim.App.), *cert. denied,* 510 U.S. 830 (1993), and denied Jennings's application for a writ of habeas corpus, *Ex Parte Jennings,* Nos. AP-75,806 and 75,807 (Tex.Crim.App. 2008).

II. Discussion

A. The Anti-Terrorism and Effective Death Penalty Act

This petition is governed by the Anti-Terrorism and Effective Death Penalty Act ("AEDPA"). *See Lindh v. Murphy,* 521 U.S. 320, 335-36 (1997). Under the AEDPA, this Court cannot grant relief on claims that were decided on the merits by the state courts

unless the state court's decision (1) "was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States" or (2) "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d); *Kitchens v. Johnson,* 190 F.3d 698, 700 (5th Cir. 1999).

For questions of law or mixed questions of law and fact decided on the merits in state court, this Court may not grant relief unless the state court decision "was contrary to, or involved an unreasonable application of, clearly established [Supreme Court precedent]." *See Martin v. Cain,* 246 F.3d 471, 475 (5th Cir.), *cert. denied,* 534 U.S. 885 (2001). A state court decision is contrary to clearly established precedent if "'the state court arrives at a conclusion opposite to that reached by [the Supreme Court] on a question of law or if the state court decides a case differently than [the Supreme Court] has on a set of materially indistinguishable facts.'" *Dowthitt v. Johnson,* 230 F.3d 733, 740-41 (5th Cir. 2000), *cert. denied,* 532 U.S. 915 (2001) (quoting *Williams v. Taylor,* 529 U.S. 362, 406 (2000)).

The "unreasonable application" standard permits relief only if a state court decision "identifies the correct governing legal rule from [the Supreme Court] cases but unreasonably applies it to the facts of the particular state prisoner's case" or "if the state court either unreasonably extends a legal principle from [Supreme Court] precedent to a new context where it

should not apply or unreasonably refuses to extend that principle to a new context where it should apply." *Williams,* 529 U.S. at 406. "In applying this standard, we must decide (1) what was the decision of the state courts with regard to the questions before us and (2) whether there is any established federal law, as explicated by the Supreme Court, with which the state court decision conflicts." *Hoover v. Johnson,* 193 F.3d 366, 368 (5th Cir. 1999). A federal court's "focus on the 'unreasonable application' test under section 2254(d) should be on the ultimate legal conclusion that the state court reached and not on whether the state court considered and discussed every angle of the evidence." *Neal v. Puckett,* 239 F.3d 683, 696 (5th Cir. 2001), *aff'd,* 286 F.3d 230 (5th Cir. 2002) (en banc), *cert. denied sub nom. Neal v. Epps,* 537 U.S. 1104 (2003). The sole question under the 'unreasonable application' prong is "whether the state court's determination is 'at least minimally consistent with the facts and circumstances of the case.'" *Id.* (quoting *Houton v. Cooper,* 109 F.3d 330, 335 (7th Cir. 1997)); *see also Gardner v. Johnson,* 247 F.3d 551, 560 (5th Cir. 2001) ("Even though we cannot reverse a decision merely because we would reach a different outcome, we must reverse when we conclude that the state court decision applies the correct legal rule to a given set of facts in a manner that is so patently incorrect as to be 'unreasonable.'"). The state court's factual determinations are presumed correct unless rebutted by "clear and convincing evidence." 28 U.S.C. § 2254(e)(1); *see also Jackson v. Anderson,* 112

F.3d 823, 824-25 (5th Cir. 1997), *cert. denied,* 522 U.S. 1119 (1998).

B. The Standard for Summary Judgment

"As a general principle, Rule 56 of the Federal Rules of Civil Procedure, relating to summary judgment, applies with equal force in the context of habeas corpus cases." *Clark v. Johnson,* 202 F.3d 760, 764 (5th Cir.), *cert. denied,* 531 U.S. 831 (2000). Ordinarily, the "evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor." *Anderson v. Liberty Lobby,* 477 U.S. 242, 255 (1986). When, however, the petitioner fails to show by clear and convincing evidence that the presumption of correctness required by 28 U.S.C. § 2254(e)(1) should not apply to state court findings, those findings are entitled to deference. *See Marshall v. Lonberger,* 459 U.S. 422, 432 (1983); *Sumner v. Mata,* 449 U.S. 539, 547 (1981); *Foster v. Johnson,* 293 F.3d 766, 777 (5th Cir.), *cert. denied sub nom Foster v. Epps,* 537 U.S. 1054 (2002); *Dowthitt v. Johnson,* 230 F.3d 733, 741 (5t 2000), *cert. denied,* 532 U.S. 915 (2001); *Emery v. Johnson,* 940 F.Supp. 1046, 1051 (S.D. Tex. 1996), *aff'd,* 139 F.3d 191 (5th Cir. 1997), *cert. denied,* 525 U.S. 969 (1998)

C. Summary Judgment

Jennings asserts that he received ineffective assistance of counsel during the penalty phase of his

trial. To prevail on a claim for ineffective assistance of counsel, Jennings

> must show that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed by the Sixth Amendment. Second, the [petitioner] must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

Strickland v. Washington, 466 U.S. 668, 687 (1984). To show deficient performance by counsel, Jennings must demonstrate that counsel's representation fell below an objective standard of reasonableness. *Id.* at 687-88. Reasonableness is measured against prevailing professional norms, and must be viewed under the totality of the circumstances. *Id.* at 688. Review of counsel's performance is deferential. *Id.* at 689.

In assessing prejudice in a sentencing hearing, "the question is whether there is a reasonable probability that, absent the errors, the sentencer would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." *Strickland,* 466 U.S. at 695. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694.

1. Deficient Performance

a. Failure to Present Background Evidence

Counsel wanted Jennings to testify about his upbringing without being subject to cross examination. 39 Tr. at 196-200.[1] When the trial court refused that request, counsel decided not to call Jennings. Jennings now contends that counsel was deficient. He argues that, because the State presented evidence of his criminal past, no additional harm could have come from cross examination. He also observes that his mother and his sister were available to testify about his childhood.

Evidence about Jennings's background would have shown that he grew up in poverty, that he was conceived as a result of a rape, that his mother gave birth to him when she was 17 and blamed his birth for interrupting her education, she resented him for it and made her resentment plain to him, and that she was a drug addicted single mother. 1 SH at 77-80.[2] The record shows that counsel elected not to call Mrs. Jennings because she was unsympathetic to Jennings, but Jennings argues that any resentment she displayed on the witness stand would only emphasize his difficult background. Counsel did not call Jennings's sister Carla because he thought she was too young to

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[1] "TR" refers to the transcript of Jennings's trial.

[2] "SH" refers to the transcript of Jennings's state habeas corpus proceeding.

remember relevant facts when Jennings first entered the juvenile justice system. Jennings points out that she was 12 years old at the time, and argues that she was old enough to remember the family's living conditions. 1 SH at 351.[3]

Counsel did not review the clerk's file from Jennings's previous convictions. That file contained evidence that Jennings has a low IQ and some brain damage, resulting in poor impulse control. Counsel acknowledged that he would have sought expert psychological assistance if he knew of the previous examinations. 1 SH at 41-42. Jennings also argues that counsel's failure to present evidence of low intelligence and mental health problems forfeited a habeas claim that would have resulted in a new sentencing hearing.

1.) Failure to Call Jennings

The state habeas court found that counsel had valid strategic reasons for choosing not to call Jennings, his mother, or his sister. 2SH at 416, 426. Jennings now argues that counsel's opinion that cross examination

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[3] It is not clear that Carla was 12 years old at the time. Her affidavit indicates that she was born in 1961 or 1962 (her 1996 affidavit states that she was 34 years old), and TDCJ records list Jennings's birthdate as 1957. Carla's affidavit estimates that Jennings entered the juvenile justice system when he was 15, at which time Carla would have been about 10. Nonetheless, a 10 year old is certainly old enough to be aware of her family's living conditions.

would harm his case was not valid in light of the State's evidence of his extensive criminal background. The record does not show what counsel feared, but cross examination always carries risks. It may be true that there was no additional evidence of Jennings's criminal history, but counsel could reasonably have feared that Jennings would appear unremorseful, be provoked into an angry outburst, or otherwise appear in an unsympathetic light.

> A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action "might be considered sound trial strategy."

Strickland, 466 U.S. at 689. Because there were legitimate risks, counsel's decision is entitled to deference as a valid strategic decision.

2.) Failure to Call Jennings's Mother

Counsel also stated that he elected not to call Mrs. Jennings because she was unsympathetic to her son. Jennings argues that this would have made her

a more potent witness, demonstrating how he grew up without any parental support. While Jennings's argument is compelling, *Strickland* requires great deference to counsel's decisions. Counsel's concerns that Mrs. Jennings's hostility would be harmful, *e.g.*, might convince jurors that Jennings was irredeemable (if even his own mother does not like him), were legitimate, even if Jennings offers a valid argument for viewing the potential impact of the testimony differently. Counsel's decision not to call Mrs. Jennings is within the bounds of counsel's reasonable discretion.

3.) Failure to Call Jennings's Sister

Counsel's explanation for not calling Jennings's sister makes no sense. Counsel stated that Jennings's sister was too young to remember pertinent events. The record shows that she was about 10 years old when Jennings first entered the juvenile justice system. That is certainly old enough to remember conditions at home at the time. Counsel's explanation is therefore contrary to the facts, and the TCCA's conclusion "was based on an unreasonable determination of the facts. " 28 U.S.C. § 2254(d).

Moreover, while counsel's explanations for not calling Jennings or his mother might make sense in isolation, the decision to call *none* of these three potential witnesses, and therefore present *no* evidence of the emotional and economic deprivations of Jennings's background, was not sound trial strategy. Whatever

damage counsel may have feared from cross examination of Jennings or Mrs. Jennings's hostility toward her son is far outweighed by the damage caused by presenting *no* evidence at all of Jennings's background, *i.e.*, giving the jury no reason not to impose a death sentence. *Wiggins v. Smith*, 539 U.S. 510 (2003) and *Williams v. Taylor*, 529 U.S. 362 (2000) make clear that failure to present available significant mitigating evidence resulting in the virtual absence of a mitigation case is deficient performance. Considering both the objective unreasonableness of counsel's conclusion that Jennings's sister was too young to remember pertinent events and conditions and the objective unreasonableness of presenting *no* evidence of Jennings's background, the state court's conclusion that counsel was not deficient was unreasonable.

b. Failure to Present Evidence of Low IQ and Mental Health Issues

In 1978, a state court ordered a psychological evaluation to determine Jennings's competency to stand trial after he was charged with two aggravated robberies and burglary of a habitation. The psychologist, Dr. J.M. Bloom, found that Jennings has an IQ of 65 and mild organic brain dysfunction. 2 SH at 391-94. There is evidence that the brain damage was caused by a childhood injury. *Id.* at 77-78.

There is also evidence that Jennings was malingering. 1 SH at 48-49, 336-47. Some of the evidence of malingering is in Dr. Bloom's report. The State

presented a report by Victor R. Scarano, M.D. Dr. Scarano states unequivocally that Jennings malingered. His opinion was not based on an examination of Jennings, but on review of documents. *Id.* at 336-47.

The state habeas court found that counsel was not deficient because the evidence did not show organic brain dysfunction. 2 SH at 414, 425. Specifically, the court found that Dr. Bloom stated "that the applicant was malingering or attempting to present himself as a mentally ill individual in order to delay court proceedings." 2 SH at 425. The court's conclusion quotes selectively from Dr. Bloom's report. Bloom concluded that Jennings has low IQ and mild organic brain dysfunction but that he was exaggerating his symptoms in an attempt to appear incompetent to stand trial.

> Although the results of psychological assessment techniques suggests the presence of mild mental[ ] retardation and mild organic brain dysfunction, it is [my] opinion that these are not severe enough to produce the kind of defects which Mr. Jennings manifested during [the] interview."

Id. at 393. The court's conclusion was based on an unreasonable determination of the facts; Dr. Bloom's report *did* conclude that Jennings has low IQ and brain damage. Counsel, however, did not know this because they never reviewed the clerk's file from Jennings's prior convictions.

"[S]trategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." *Wiggins v. Smith*, 539 U.S. at 521 (internal quotation marks and alteration omitted) (quoting *Strickland,* 668 U.S. at 690-91). When assessing the reasonableness of an attorney's investigation, a court must "consider not only the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further." *Id.* at 527. Based on the evidence available to counsel at the time of trial, reasonable investigation, *i.e.,* reading the clerk's files from Jennings's prior convictions, would have revealed that Jennings was diagnosed with a low IQ and organic brain damage, and would have led to further investigation and a request for expert assistance. Counsel was deficient for failing to investigate.

c. Closing Argument

In his closing argument at the penalty phase, counsel stated that "I can't quarrel with" a decision to sentence Jennings to death because counsel, like the jurors, lived and worked in Harris County and cared about having a safe community. He nonetheless asked the jurors to give sufficient weight to the mitigating evidence to return a life sentence. 39 Tr. ay [sic] 239-40. Jennings now argues that this was ineffective.

Counsel was trying to convince the jury to decline to impose a death sentence on a man who they found murdered a police officer. The penalty phase evidence showed that Jennings had a long and violent criminal history. There was virtually no mitigating evidence. It is clear from the record that counsel was trying to identify with the jurors, and to convince them that he was a reasonable man who shared their interest in a safe community. In that posture, he argued that they should still impose a life sentence. In light of the extremely weak mitigation case, the state habeas court's conclusion that this was a plausible strategy was not unreasonable.

2. Prejudice

In determining whether Jennings was prejudiced by counsel's deficient performance, "the question is whether there is a reasonable probability that, absent the errors, the sentencer would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." *Strickland,* 465 U.S. at 695. "A reasonable probability is a probability sufficient to undermine confidence in the outcome," *Id.* at 694. Texas requires a unanimous jury to impose a death sentence. TEX. CODE CRIM PROC. art. 37.071 § 2(d)(2). Therefore, if there is a reasonable probability that even one juror would have voted against a death sentence, then Jennings was prejudiced.

a. Evidence of Brain Damage

One of the special issues the jury had to answer was whether Jennings deliberately killed Howard.[4] The State now argues, and the TCCA found, that evidence of poor impulse control would have been worthless because Jennings murdered Officer Howard in a deliberate manner, approaching Howard from behind and firing the last two shots from point blank range after Howard collapsed. The TCCA concluded that no juror would have found that Jennings acted impulsively, as opposed to deliberately, because "at least two to three seconds" lapsed between the first two shots and the last two. *Ex Parte Jennings,* Nos. AP-75,806 and 75,807 at 15 (Tex. Crim. App. Nov. 26, 2008). This conclusion is unreasonable.

All that was necessary for a "no" answer to the deliberateness special issue was for one juror to find that Jennings acted impulsively and not deliberately. In support of this argument, counsel could have presented evidence that Jennings had organic brain dysfunction resulting in poor impulse control. The TCCA has explained that "[t]he person who engages in certain conduct deliberately has upon consideration said to himself, 'Let's do it.'" *Fearance v. State* 620 S.W.2d 577, 584 n.6 (Tex.Crim.App., 1980). A juror could certainly have found that a brain-damaged man who has

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[4] "[W]hether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that . . death . . would result"). *See* former TEX. CODE CRIM. PROC. art. 37.071 § b(1).

poor impulse control and a low IQ did not engage in that kind of reflection and consideration during a lapse of two or three emotionally charged seconds. The TCCA's contrary conclusion was an unreasonable determination of the facts. *See, e.g., Ex Parte Garrett* 831 S.W.2d 304, 307 (Tex.Crim.App. 1991) (Clinton, J., dissenting on grounds that evidence of brain damage and mental illness not presented at trial raised a reasonable probability of a different outcome).[5]

b. Background Evidence

The factual basis for Jennings's claim is comparable to those in *Wiggins v. Smith*, 539 U.S. 510 (2003) and *Williams v. Taylor,* 529 U.S. 362 (2000). In both cases, counsel failed to investigate and develop a mitigation case. Evidence presented during post-conviction proceedings showed that both Wiggins and Williams suffered parental abuse and neglect as children, and had low intelligence (though neither was mentally retarded). *See, e.g.*, 539 U.S. at 516-17, 525; 529 U.S. at 370. Williams, like Jennings, had an extensive criminal history dating to his childhood and including violent offenses. 529 U.S. at 368-69. In each

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[5] Judge Clinton's dissent is not cited as precedent, but as support for the conclusion that there is a reasonable probability the result would have been different if counsel presented the evidence of brain damage and resulting poor impulse control. If a Judge of the Texas Court of Criminal Appeals could find similar evidence in a similar case compelling, then it is reasonably probable that at least one juror could have found that Jennings did not act deliberately.

case, the Supreme Court found the petitioner was prejudiced by counsel's failure to investigate, develop, and present mitigating evidence. 539 U.S. at 536; 529 U.S. at 397-98.

"[E]vidence about the defendant's background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background may be less culpable than defendants who have no such excuse." *Penry v. Lynaugh,* 492 U.S. 302, 319 (1989).

Evidence about Jennings's background and character, his low intelligence, and his brain damage leading to poor impulse control, might have been sufficient to convince at least one juror that Jennings did not deserve a death sentence. *See Williams,* 529 U.S. at 370 (finding prejudice when counsel failed to present evidence of "neglect during [Williams's] early childhood, as well as testimony that he was borderline mentally retarded, had suffered repeated head injuries, and might have mental impairments organic in origin.") The similarities between this case and *Williams* are too strong to ignore, and the TCCA "decided [the] case differently than [the Supreme Court] has on a set of materially indistinguishable facts." *Williams,* 529 U.S. at 406. The TCCA's decision was therefore contrary to clearly established federal law and Jennings has established prejudice.

c. *Penry*

Jennings also argues that evidence of his low intelligence would have entitled him to state habeas relief after the Supreme Court decided *Penry v. Johnson,* 532 U.S. 782 (2001). Because Jennings never raised this claim based on this evidence in state court, it is unexhausted and procedurally defaulted.[6] *See* 28 U.S.C. § 2254(b)(1); *Orman v. Cain,* 228 F.3d 616, 619-20 (5th Cir. 2000); *Coleman v. Thompson,* 501 U.S. 722, 735 n.1 (1991).

III. Order

1. Jennings's Petition (Docket Entry 1) is Granted;
2. Thaler's Motion for Summary Judgment (Docket Entry 6) is Denied;
3. Thaler shall release Jennings from custody unless, within 120 days, the State of Texas grants Jennings a new sentencing hearing or resentences him to a term of imprisonment as provided by Texas law at the time of Jennings's crime; and
4. This Order is stayed until all post-judgment motions and appeals are final or the time to file such motions and appeals expires.

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[6] Jennings raised a *Penry* claim in state court but limited it to the evidence he presented at trial. That was insufficient to exhaust the claim. *See Jones v. Jones,* 163 F.3d 285, 298 (5th Cir. 1998); *Knox v. Butler,* 884 F.2d 849, 852 n.7 (5th Cir. 1989).

So Ordered

/s/ Lynn N. Hughes
Lynn N. Hughes
United States District Judge

Houston, Texas
April 23, 2012

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

ROBERT MITCHELL JENNINGS, Petitioner, v. RICK THALER, Director, Texas Department of Criminal Justice-Correctional Institutions Division, Respondent.	§ § § § § § § § § §	H-09-219

FINAL JUDGMENT

(Filed Apr. 23, 2012)

Jennings's Petition for a writ of Habeas Corpus (Docket Entry 1) is Granted. Thaler shall release Jennings from custody unless, within 120 days, the State of Texas grants Jennings a new sentencing hearing or resentences him to a term of imprisonment as provided by Texas law at the time of Jennings's crime. Thaler's Motion for Summary Judgment (Docket Entry 6) is Denied.

/s/ Lynn H. Hughes
Lynn H. Hughes
United States District Judge

Houston, Texas
April 23, 2012

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

ROBERT MITCHELL JENNINGS, Petitioner, v. RICK THALER, Director, Texas Department of Criminal Justice, Correctional Institutions Division, Respondent.	§ § § § § § § § § § §	CIVIL ACTION NO. 4:09-CV-00219 ECF (Death Penalty Case)

RESPONDENT THALER'S NOTICE OF APPEAL

(Filed May 17, 2012)

Notice is hereby given that Rick Thaler, respondent in the above-named case, hereby appeals to the United States Court of Appeals for the Fifth Circuit from this Court's memorandum and order and final judgment of April 23, 2012, conditionally granting habeas relief to Petitioner Robert Mitchell Jennings. Mem. & Order, ECF No. 10; Final J., ECF No. 11.

Respectfully submitted,

GREG ABBOTT
Attorney General of Texas

DANIEL T. HODGE
First Assistant Attorney General

DON CLEMMER
Deputy Attorney General
for Criminal Justice

EDWARD L. MARSHALL
Chief, Postconviction
Litigation Division

s/ Ellen Stewart-Klein
ELLEN STEWART-KLEIN*

*Attorney in Charge

Assistant Attorney General
Postconviction Litigation
Division
State Bar No. 24028011
SD ID No. 27861

P. O. Box 12548, Capitol Station
Austin, Texas 78711-2548
(512) 936-1600
(512) 320-8132 (Fax)

ATTORNEYS
FOR RESPONDENT

[Certificate Of Service Omitted In Printing]

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

ROBERT MITCHELL JENNINGS, Petitioner-Appellee	§	
VS.	§	CAUSE NO. 12-70018
RICK THALER, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION, Respondent-Appellant	§	

MOTION TO ISSUE A CERTIFICATE OF APPEALABILITY

(Filed Nov. 29, 2012)

TO A CIRCUIT JUDGE OF THE FIFTH CIRCUIT:

Appellee, Robert Mitchell Jennings, moves that a circuit judge of the Fifth Circuit issue a certificate of appealability (COA) to enable him to appeal the denial of habeas corpus relief on one aspect of his ineffective assistance of counsel (IAC) claim, and would show as follows:

I.

The district court granted habeas corpus relief on an IAC at the punishment stage claim, and the Director timely appealed.

II.

The standard for granting a certificate of appealability is whether the moving party has made a substantial showing of the denial of a federal constitutional right. *Drinkard v. Johnson,* 97 F.3d 751, 755-56 (5th Cir. 1996). A "substantial showing" means that the issues are debatable among jurists of reason; that a court could resolve the issues in a different manner; and that the issues are adequate to deserve encouragement to proceed further. *Id.* at 755. The moving party need not show that the appeal will succeed. *Miller-El v. Cockrell,* 537 U.S. 322, 337 (2003).

III.

Assuming that Appellee must request a COA to file a cross-point challenging the district court's denial of relief on one aspect of an IAC claim where the district court sustained the IAC claim, the Director appealed, and the claim is before the Court, he requests the issuance of a COA on the issue of whether the district court erred in upholding the state court decision that trial counsel was not ineffective in arguing that he could not quarrel with a death sentence.

Respectfully submitted,

/s/ Randy Schaffer

Randy Schaffer
State Bar No. 17724500

The Schaffer Firm
1301 McKinney, Suite 3100
Houston, Texas 77010
(713) 951-9555
(713) 951-9854 (facsimile)
noguilt@swbell.net

Attorney for Appellee
ROBERT MITCHELL JENNINGS

[Certificate Of Service Omitted In Printing]

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 12-70018

ROBERT MITCHELL JENNINGS,

Petitioner-Appellee

v.

WILLIAM STEPHENS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION

Respondent-Appellant

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 4:09-CV-219

(Filed Jul. 22, 2013)

Before STEWART, Chief Judge, SOUTHWICK and HAYNES, Circuit Judges. PER CURIAM:*

In 1989, Robert Mitchell Jennings was convicted of capital murder and sentenced to death. His conviction

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* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

and sentence were affirmed on direct appeal, and his state habeas application was denied. In 2009, Jennings filed a federal habeas petition, alleging that his attorneys were ineffective for failing to present evidence of his disadvantaged background and for failing to find and present evidence of his mental impairment. The district court agreed and granted habeas relief. The Director of the Texas Department of Criminal Justice filed a timely notice of appeal. We REVERSE and RENDER.

FACTS AND PROCEDURAL HISTORY

On July 19, 1988, Jennings shot and killed Elston Howard, an officer with the Houston Police Department. Officer Howard was in the process of arresting the clerk of an adult bookstore when Jennings entered the store, intending to commit a robbery. Jennings shot Officer Howard four times in the back and head and then robbed the store clerk.

A jury convicted Jennings of capital murder. During the punishment phase, the State of Texas presented evidence of Jennings' lengthy criminal history. At the age of fourteen, Jennings was declared a delinquent and placed on probation. At seventeen, he was convicted of aggravated robbery and sentenced to five years' imprisonment. At twenty, he was convicted of two more aggravated robberies and a burglary and sentenced to concurrent thirty-year sentences. Within two months of his release, he

committed six more aggravated robberies, including the one that resulted in Officer Howard's death.

George Burrell, the jail chaplain, was the only defense witness called during the punishment phase. Burrell testified that he met Jennings in the county jail shortly after Jennings' arrest for Officer Howard's murder. Burrell saw Jennings two to three times a week, and he testified that he did not believe Jennings was "incorrigible." No other mitigation evidence was presented.

In 1996, Jennings filed a state habeas application, alleging he received ineffective assistance of counsel at the punishment phase. Specifically, he claimed that his attorneys were ineffective for failing to call his mother and sister to testify regarding his disadvantaged background and for failing to find and present a 1978 psychological report, which suggested that Jennings had "mild organic brain dysfunction" and was mildly mentally retarded.

The state court found that Jennings' attorneys had performed a sufficient investigation into Jennings' background. As part of that investigation, counsel interviewed Flora and Carla Jennings, his mother and sister, respectively. Connie Williams, one of Jennings' attorneys, submitted an affidavit explaining that he decided not to call Jennings' mother because he perceived her as "not very sympathetic" to Jennings. He reached the same conclusion with respect to Jennings' sister Carla. One of the attorney's concerns was that Jennings had been in and out

of prison for most of his sister's life. The state court concluded that counsel's decision not to present testimony from either Flora or Carla Jennings was reasonable trial strategy.

The state court also found that Jennings had failed to show he was mentally retarded or suffered from organic brain dysfunction. The state court considered the 1978 psychological report completed by Dr. J.M. Bloom (the "Bloom Report").[1] In his report, Dr. Bloom suggested that Jennings was mildly retarded and suffered from organic brain dysfunction. The court noted that Dr. Bloom believed Jennings was malingering.

The state court also considered the reports from the more recent psychological evaluations performed on Jennings in connection with the state habeas proceedings. In 1996, a quantitative electroencephalography ("QEEG") test was performed on Jennings. The QEEG revealed "dysfunction in the frontal and temporal areas of the applicant's brain." A single photon emissions tomography ("SPECT") study was also performed, and it revealed "the presence of frontal and left temporal lobe impairment." The SPECT and QEEG results were then evaluated by a psychologist, who concluded that Jennings' "capacity

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[1] The report, completed ten years before Officer Howard's murder, was prepared as part of a competency evaluation Jennings had been ordered to undergo in connection with the prosecution of aggravated robbery and burglary charges.

for emotional control and self-inhibition" was impaired.

The state court found that the conclusions reached based on the SPECT and QEEG results were unpersuasive given the contrary evidence that Jennings was smart and did not suffer from any mental defects. A 1978 pre-sentence investigation report revealed that Jennings had obtained his G.E.D. and had completed over forty hours of college credit while incarcerated. A 1989 psychological evaluation performed by the Texas Department of Corrections ("TDC") indicated that Jennings had no history of mental health problems and voiced no psychological complaints. A TDC social summary report reflected that Jennings had obtained a barber's license and a butcher's certificate while incarcerated. Accordingly, the state court recommended that the Texas Court of Criminal Appeals deny Jennings' request for habeas relief. The Court of Criminal Appeals accepted the recommendation and denied relief.

In 2009, Jennings filed a petition under 28 U.S.C. § 2254 in the United States District Court for the Southern District of Texas. The district court granted the petition, finding that Jennings had received ineffective assistance of counsel. Specifically, the court found that counsel was ineffective for failing to present testimony regarding Jennings' disadvantaged background and for failing to uncover the Bloom Report and perform a subsequent investigation into Jennings' mental health.

The court acknowledged the "legitimate risks" associated with calling Jennings or his mother to testify regarding his background, then concluded that counsel's decision not to call them was reasonable trial strategy. The court found that the decision not to call his sister Carla "made no sense." The court reasoned that while she may not have had a close relationship with Jennings, she still could have testified regarding the difficult circumstances of their home life. The court explained that while each individual decision not to call a specific witness may have made sense in isolation, the failure to present *any* evidence of Jennings' disadvantaged background was not reasonable trial strategy.

The district court also found that Jennings' counsel was deficient for failing to uncover the Bloom Report. The court acknowledged Dr. Bloom's concern that Jennings was malingering; even so, the court noted that Dr. Bloom concluded that Jennings suffered from mild mental retardation and organic brain dysfunction. The court held that counsel was deficient for failing to adequately investigate and uncover evidence of Jennings' mental impairment.

Finally, the district court found that counsel's failure to investigate, develop, and present mitigation evidence prejudiced Jennings. The court concluded that evidence of Jennings' disadvantaged background and his mental impairments "might have been sufficient to convince at least one juror that Jennings did not deserve the death sentence."

DISCUSSION

This case is governed by the Antiterrorism and Effective Death Penalty Act. Under AEDPA, a federal court may not grant habeas relief after an adjudication on the merits in a state court proceeding unless the state court's decision (1) "was contrary to, or involved an unreasonable application of clearly established Federal law, as determined by the Supreme Court of the United States" or (2) "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d). Moreover, a state court's factual findings are presumed to be correct unless the applicant rebuts the presumption by clear and convincing evidence. 8 U.S.C. § 2254(e)(1).

When reviewing a district court's grant of habeas relief, issues of law are reviewed *de novo* and factual findings are reviewed for clear error. *Woodfox v. Cain,* 609 F.3d 774, 788-89 (5th Cir. 2010). "A claim of ineffective assistance of counsel presents a mixed question of law and fact. If the district court's findings of fact are not clearly erroneous, we will independently apply the law to the facts as found by the district court." *Id.* (citation omitted).

All of Jennings' habeas claims relate to the issue of whether he received ineffective assistance of counsel at the punishment phase. To succeed in this claim, Jennings must demonstrate that his attorneys performed deficiently and that such performance prejudiced him. *Strickland v. Washington,* 466 U.S. 668,

687 (1984). Deficient performance exists when an attorney's conduct falls "below an objective standard of reasonableness." *Id.* at 688. An attorney's effective assistance at least includes conducting a "reasonably substantial investigation" into potential defenses. *Id.* at 680. Nonetheless, the Supreme Court has "declined to articulate specific guidelines for appropriate attorney conduct and instead [has] emphasized that 'the proper measure of attorney performance remains simply reasonableness under prevailing professional norms,'" *Wiggins v. Smith,* 539 U.S. 510, 521 (2003) (quoting *Strickland,* 466 U.S. at 688).

Demonstrating prejudice requires the defendant to "show that there is a reasonable probability that, but for counsel's unprofessional errors, the results of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland,* 466 U.S. at 694. The *Strickland* standard does not require the petitioner to show it was more likely than not that the outcome would have been different. *Woodford v. Visciotti,* 537 U.S. 19, 22 (2002). Instead, "[u]ndermining confidence in the outcome is exactly *Strickland's* description of what is meant by the reasonable probability standard." *Id.* at 23 (quotation marks omitted). Further, although "[j]udicial scrutiny of counsel's performance must be highly deferential , strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to

make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Strickland,* 466 U.S. at 689-91.

At the time of Jennings' trial, Texas law provided that a death sentence could not be imposed unless the jurors unanimously answered three special issues in the affirmative; it permitted jurors to answer the special issues in the negative only if "10 or more jurors agree." TEX. CODE CRIM. PROC. ANN. art. 37.071(d)-(e) (West 1985). Therefore, Jennings can show he would not have been sentenced to death by this panel of jurors if he can establish a "reasonable probability" that one juror would have persisted in a negative answer to one of the special issues based on evidence that his attorneys did not discover or present. Importantly, AEDPA deference requires that Jennings establish that all reasonable jurists would agree that he was prejudiced, which means that no reasonable person could adopt the state habeas court's position that no prejudice occurred. *See Yarborough v. Alvarado,* 541 U.S. 652, 664 (2004).

A. Mental Impairment

Jennings argues that his attorneys' failure to discover the Bloom Report and perform a subsequent investigation into his mental health constitutes

deficient performance and that the state habeas court's conclusion to the contrary is unreasonable.[2]

In his affidavit, Williams admitted that he had failed to review the case files from Jennings' prior convictions, which contained the Bloom Report. He further stated that if he had known about the report, he would have "requested further psychological evaluation." The Director acknowledges these statements but contends that regardless of what Jennings' attorney did or not did not review, every document in existence at the time of trial showed that Jennings was intelligent and did not suffer from any mental impairment. Stated another way, Jennings has failed to show prejudice under *Strickland*. We agree.

Dr. Bloom stated that his evaluation of Jennings revealed a low IQ and mild organic brain dysfunction,

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[2] Jennings also urges that this court need not defer to the state habeas court's findings because the Texas Court of Criminal Appeals did not adopt the factual findings of the state district court concerning this issue. The case on which Jennings relies for this proposition, *Guidry v. Dretke*, 397 F.3d 306, 326 (5th Cir. 2005), was abrogated by the Supreme Court's decision in *Cullen v. Pinholster*, 131 S. Ct. 1388 (2011). *McCamey v. Epps*, 658 F.3d 491, 497 n.1 (5th Cir. 2011). Further, although it declined to decide the deficient-performance element for the mental-impairment issue, the Court of Criminal Appeals did not disturb the state district court's finding that Jennings' attorneys were not deficient in this regard. *See Ex parte Jennings*, Nos. AP-75806, AP-75807, 2008 WL 5049911, at *2 (Tex. Crim. App. Nov. 26, 2008). Because this issue has been decided by the state habeas court, it must be given deference. *See Gregory v. Thaler*, 601 F.3d 347, 353 (5th Cir. 2010).

but he also concluded that Jennings was malingering. The relevant portion of the Bloom Report reads:

> Although the results of psychological assessment techniques suggest[ ] the presence of mild mental[ ] retardation and mild organic brain dysfunction, it is [my] opinion that these are not severe enough to produce the kind of deficits which Mr. Jennings manifested during [the] interview. It is felt that he is attempting to present himself as a mentally ill person in order to delay proceedings.

The Bloom Report's statement that these conditions were enhanced by Jennings' malingering does not necessarily excuse his attorneys' failure to perform a mental-health investigation. Indeed, the Texas Court of Criminal Appeals noted that Jennings' attorneys "may well have performed deficiently" by not conducting a mental-health investigation based on the Bloom Report. It explained that "[e]ven if Dr. Bloom himself attributed the applicant's test results to malingering, it is arguable that his report should nevertheless have sufficed to alert competent trial counsel that further psychological evaluation would be appropriate." In the end, the court did not decide this issue because it determined that even if Jennings' attorneys performed deficiently, their failure to perform a mental-health investigation did not prejudice Jennings.

The district court disagreed. It held counsel to be deficient for failing to uncover the Bloom Report and investigate Jennings' mental health. The district

court relied on *Williams v. Taylor*, 529 U.S. 362 (2000). In *Williams*, the Supreme Court held that the defendant's attorneys performed deficiently when "[t]hey failed to conduct an investigation that would have uncovered extensive records graphically describing [the defendant's] nightmarish childhood, not because of any strategic calculation but because they incorrectly thought that state law barred access to such records." *Id.* at 395. Attorneys deficiently performed when they failed to uncover or introduce a "voluminous amount" of available evidence, including that the defendant was "borderline mentally retarded." *Id.* at 396.

The Supreme Court has also explained that a defendant's attorney "has a substantial and important role to perform in raising mitigating factors both to the prosecutor initially and to the court at sentencing. Investigation is essential to fulfillment of these functions." *Wiggins*, 539 U.S. at 524-25 (quoting 1 ABA Standards for Criminal Justice 4-4.1, cmt., p. 4-55 (2d ed. 1982)). The *Wiggins* Court went on to conclude that the representation provided by Wiggins' attorneys fell below the *Strickland* standard when they failed "to expand their investigation beyond the [presentence investigation report] and the [Department of Social Services records]." *Id.* at 524.

Jennings' attorneys admit that "fail[ing] to investigate Mr. Jennings' mental status or present evidence of his mental impairment was not strategic; rather, it was a consequence of our lack of knowledge of any diagnosed mental impairment." The district

court considered the similarities between Jennings' case and *Williams* "too strong to ignore." One distinction we see is that there was significantly more mitigation evidence available in *Williams* than here. For example, in addition to the evidence that Williams was "borderline mentally retarded," his attorneys failed to uncover and present evidence that Williams had only achieved a sixth-grade education and had received commendations for helping end a prison drug ring and for returning a prison guard's wallet. *Williams,* 529 U.S. at 396. Further, prison guards would have testified that Williams was the least likely among the inmates to act violently, and a certified public accountant would have testified based on his interactions with Williams during a prison ministry program that he was "thriv[ing] in a more regimented and structured environment." *Id.* We have already summarized the evidence discoverable as to Jennings, and it is not of that magnitude.

Jennings also argues that in light of the evidence that could have been presented supporting a mental deficiency, the Texas Court of Criminal Appeals unreasonably concluded that his attorneys' errors did not prejudice him. Specifically, he points to the results of the additional psychological evaluations performed as part of the state habeas proceedings. Following the discovery of the Bloom Report by Jennings' state habeas attorney, Jennings' mental condition was evaluated by at least three doctors. Dr. Meyer Poler performed a QEEG test on Jennings. According to Dr. Poler's report, Jennings' QEEG

results were consistent with "affective disorder and/or learning disability" and suggested that Jennings might benefit from treatment with antidepressants. The test also suggested that Jennings suffered from post-concussive syndrome – a mild form of traumatic brain injury.

A SPECT study was also performed on Jennings. Dr. Theodore Simon reviewed the results. In his report, Dr. Simon explained that the results of the SPECT test revealed abnormalities in certain parts of Jennings' brain that "support the contention" that Jennings had suffered from a brain injury. The results of the QEEG and the SPECT test were reviewed by Dr. Windel Dickerson. In his report, Dr. Dickerson concluded that Jennings was not mentally retarded. Dr. Dickerson nevertheless concluded that the QEEG and SPECT tests confirmed that "Mr. Jennings suffers from periods in which impulsive action overcomes the capacity for reason and foresightful action." Dr. Dickerson further explained that "Mr. Jennings' capacity for emotional control and self-inhibition is less than that of an unimpaired person and his condition has a demonstrable physical basis."

The Director responds to these reports by admitting that Jennings "may have a learning disability, may benefit from antidepressants, and may have a brain injury of unspecified type and severity." The Director nonetheless contends that the presentation of the Bloom Report and the findings of a subsequent investigation would not have served Jennings' interests because they would have led the State to present

evidence that Jennings is mentally sound. For instance, the State could have presented the report of Dr. John Nottingham, who performed an independent psychiatric examination of Jennings the day after Dr. Bloom. In his report, Dr. Nottingham explained, that his findings "are consistent with a person who is attempting to appear to be mentally disturbed on a voluntary basis." He concluded that "[t]here does not appear to be a disease of the mind or mental defect which would interfere with [Jennings'] ability to consult with his attorney."

Also, prior to Jennings' capital trial in 1989, the court ordered Dr. Jerome Brown to perform a competency evaluation. Dr. Brown concluded that "[n]one of the information that is available at present suggests that [Jennings] was suffering from any severe mental illness or mental defect at the time the alleged offense took place" and that he was of sound mind at the time of the crime. Moreover, the State hired Dr. Victor Scarano during the state habeas proceedings to offer his opinion of Jennings based on evidence that had been collected by other doctors. Dr. Scarano did not examine Jennings; instead, his conclusions were based on his review of the psychological reports mentioned above along with other documents bearing on Jennings' mental status. Dr. Scarano concluded that Jennings "was malingering a mental disease or disorder" during his interactions with Drs. Bloom and Nottingham. Dr. Scarano also concluded that Jennings "was not mentally retarded or suffering from an organic brain dysfunction" at the time of the primary

crime, which the report found "was not an impulsive act but a controlled and deliberate act."

Dr. Scarano also criticized Dr. Dickerson's reliance on the QEEG and SPECT tests. With respect to the QEEG test, Dr. Scarano noted that "[a] specific clinical advantage has yet to be unequivocally demonstrated for any of the quantitative EEG or mapping techniques." He explained that "a QEEG is insufficient to diagnose brain damage, but may be confirmatory of a diagnosis of brain damage." Dr. Scarano also pointed to several deficiencies in the SPECT test, which Dr. Simon had emphasized in his report. For example, Dr. Simon noted that "[n]o information was available regarding the binding or age on the tracer used in this examination" – a significant limitation given that the tracer molecule used in the test is "highly unstable" and "should be injected within fifteen minutes of preparation." Dr. Simon also noted that the "banded color table used for imaging the data" was not provided to him. Dr. Scarano found it problematic that despite stating he lacked important information bearing on the reliability of the study, Dr. Simon nonetheless concluded Jennings had suffered a brain injury.

In addition to these reports, the Director urges that there was ample evidence that Jennings did not suffer from any mental infirmity. Specifically, he points to Jennings' scholastic achievements while incarcerated, his professional certifications, and his score of 105 on an IQ test. The Director contends that this evidence further demonstrates that Jennings was

not prejudiced by his attorneys' failure to investigate his mental condition.

Based on the above, Jennings has failed to establish prejudice. At best, Jennings relies on the opinions of dueling experts who would have provided conflicting evidence concerning his mental capacity. This is insufficient to meet the burden under AEDPA's deferential standard, which requires Jennings to show that no reasonable jurist would have reached the same conclusion as the state habeas court. The Court of Criminal Appeals did not reach an unreasonable conclusion regarding the lack of prejudice, and under AEDPA its decision should stand.

B. Disadvantaged Background

Jennings also argues that his attorneys provided ineffective assistance by failing to present the mitigation testimony of himself, his mother, or his sister. The Texas Court of Criminal Appeals rejected Jennings' claim on all three points. The district court held that the state court's conclusion was unreasonable to the extent that it found that the failure to call Jennings' sister did not result in ineffective assistance. The Director contends that the decision to call a prison chaplain, whose testimony presented fewer risks than the testimony of Jennings or his family members, was a fully informed strategic decision and did not amount to ineffective assistance.

In evaluating whether Jennings' attorneys were deficient, this court is "required not simply to give

[Jennings'] attorneys the benefit of the doubt, but to affirmatively entertain the range of possible reasons [Jennings'] counsel may have had for" not presenting the testimony of these three individuals. *See Cullen v. Pinholster,* 131 S. Ct. 1388, 1407 (2011) (citation and quotation marks omitted). Indeed, an attorney may decline to present evidence of a defendant's background during the penalty phase and instead focus on "convinc[ing] the jury that [the defendant] would not be a future danger in prison." *Perkins v. Quarterman,* 254 F. App'x 366, 371 (5th Cir. 2007) (unpublished); *see also Brown v. Thaler,* 684 F.3d 482, 498-99 (5th Cir. 2012).

The Texas Court of Criminal Appeals credited several reasons that would justify not calling Jennings, his mother, or his sister. For instance, Williams stated in his affidavit that he did not ask Flora Jennings to testify because he determined after interviewing her that she "was not very sympathetic to Jennings." Similar to the problem posed by calling Flora Jennings, Williams did not believe that Carla Jennings would be a sympathetic witness. In addition, Williams suggested in his affidavit that Carla Jennings would not be a beneficial witness because she was several years younger than Jennings and had little interaction with him given that he had been in and out of juvenile detention and prison for most of her life. Thus, she had limited knowledge of Jennings' upbringing. There were also legitimate risks associated with calling the defendant Jennings given that his attorneys were unable to persuade the trial court

to allow him to testify about his background without being subjected to full cross-examination.

The district court concluded it was reasonable for counsel not to call either Jennings himself or his mother as witnesses. With respect to the sister Carla Jennings, though, the court complained that the "explanation for not calling Jennings' sister makes no sense." In the district court's view, the fact that Carla Jennings did not have a close relationship with her brother had no bearing on her ability to testify about the conditions at home.

Although Carla Jennings may have been the best available option to present evidence concerning Jennings' background, we conclude there was no AEDPA-recognizable error when the state court determined that his attorneys reasonably could have decided that the risks associated with her unsympathetic testimony outweighed any benefits. True, omitting her testimony meant jurors heard no evidence regarding Jennings' disadvantaged background. A capital defendant's disadvantaged background, though, can be a "double-edged" sword that "might permit an inference that he is not as morally culpable for his behavior, [but] also might suggest [that he], as a product of his environment, is likely to continue to be dangerous in the future." *Ladd v. Cockrell,* 311 F.3d 349, 360 (5th Cir. 2002); *see also Brown,* 684 F.3d at 499. Jennings' attorneys could reasonably have concluded that resources were better spent focusing the jury's attention on Jennings' lack of future dangerousness rather than attempting

to garner support for Jennings based on his troubled background. As such, it was not unreasonable for the Texas Court of Criminal Appeals to conclude that Jennings' attorneys were not deficient with respect to their strategic decision to omit evidence of Jennings' background.

C. *Penry* Claim

Because we have determined that the state habeas court's conclusion that Jennings' attorneys were not deficient with respect to the omission of evidence on Jennings' background is reasonable, we need not consider whether counsel's decision prejudiced Jennings. Nonetheless, we address Jennings' argument that he suffered prejudice because "had counsel introduced mitigating evidence of [his] mental impairment and disadvantaged background," any death sentence he received would have been reversed based on the nullification instruction the jury received in violation of *Penry v. Lynaugh*, 492 U.S. 302 (1989) (*Penry I*), as interpreted by *Penry v. Johnson*, 532 U.S. 782 (2001) (*Penry II*).

Penry requires that jurors be provided the opportunity to "fully consider[ ] the mitigating evidence as it [bears] on the broader question of [the defendant's] moral culpability." *Penry II*, 532 U.S. at 787. "[I]t is only when the jury is given a vehicle for expressing its reasoned moral response to [mitigating] evidence in rendering its sentencing decision that [the court] can be sure that the jury has treated the

defendant as a uniquely individual human being and has made a reliable determination that death is the appropriate sentence." *Id.* at 797 (citation and quotation marks omitted) (finding a nullification instruction unconstitutional because a "reasonable juror could well have believed that there was no vehicle for expressing the view that [the defendant] did not deserve to be sentenced to death based upon his mitigating evidence" (quoting *Penry I*, 492 U.S. at 326)). Indeed, the "statutory special issues presented to the jury at sentencing and the prosecutor's closing arguments regarding those special issues" must allow the jury to give "meaningful consideration and effect to all of [the defendant's] mitigating evidence." *Pierce v. Thaler*, 604 F.3d 197, 201 (5th Cir. 2010).

This special instruction requirement was first announced by the Supreme Court on June 26, 1989, in *Penry I*. 492 U.S. at 328. The guilt phase of Jennings' trial followed shortly thereafter on July 5, 1989. In light of *Penry I*, the court gave Jennings' jury the following nullification instruction:

> When you deliberate about the questions posed in the Special Issues, you are to consider mitigating circumstances and factors, if any, supported by the evidence presented in both phases of trial. A mitigating circumstance may be any aspect of the Defendant's character and record or circumstances of the crime which you believe makes a sentence of death inappropriate in this case. If you find that there are any mitigating circumstances, you must decide how much weight they

> deserve and give them effect when you answer the Special Issues. If you determine that, in consideration of this evidence, [ ] a life sentence rather than a death sentence, is an appropriate response to the personal moral culpability of the Defendant, you are instructed to answer the Special Issue under consideration "No."

Notably, Jennings' attorneys requested this instruction and did not object to it as inadequate. Jennings was sentenced to death, and his conviction became final in 1993. In 2001, the Supreme Court in *Penry II* held that a jury instruction that was substantially similar to the instruction provided to Jennings' jury did not satisfy the Eighth Amendment's mitigation-instruction requirement as established by *Penry I*. *See Penry II,* 532 U.S. at 789-90, 803-04.

Based on the similarity between the instruction Jennings' jury received and the instruction the Supreme Court found inadequate in *Penry II,* Jennings argued in his state habeas proceeding that his Eighth Amendment right to a special instruction had been violated. After noting that Jennings' "*Penry* claim is limited to evidence adduced at his trial, and does not include the jury's ability to render a reasoned moral response to mitigating evidence he now claims *should* have been adduced," the Texas Court of Criminal Appeals determined that based on the "circumstances there is no Eighth Amendment deficiency." Specifically, the court explained that "[t]he only mitigating evidence presented at trial was Chaplain Burrell's

testimony with respect to the applicant's behavior and demeanor in the jail." This evidence, the court concluded, had only a "tenuous connection" to Jennings' moral culpability and therefore the special instruction was unnecessary. *See Abdul-Kabir v. Quarterman,* 550 U.S. 233, 253 n.14 (2007) (explaining that a "special instruction is not required when mitigating evidence has only a tenuous connection to the defendant's moral culpability"). Consequently, the court did not evaluate the sufficiency of the *Penry* instruction on the merits based on its holding that Jennings presented inadequate mitigating evidence to require an instruction.

On appeal, Jennings does not advance a pure-Penry argument. Instead, he argues that the failure to offer mitigating evidence of his background deprived him of an argument on appeal that the nullification instruction violated his Eighth and Fourteenth Amendment rights, which could have resulted in overturning his sentence on direct appeal or by a state or federal habeas court.

The district court did not consider Jennings' *Penry*-based prejudice argument because it found that Jennings failed to exhaust this claim in his state habeas proceeding. "The exhaustion requirement is satisfied when the substance of the federal habeas claim has been fairly presented to the highest state court." *Fisher v. Texas,* 169 F.3d 295, 302 (5th Cir. 1999); *see also Picard v. Connor,* 404 U.S. 270, 275 (1971). A fair opportunity to consider a claim requires that "all the facts necessary to support the federal

claim were before the state courts" and "the habeas petitioner must have fairly presented to the state courts the substance of his federal habeas corpus claim." *Anderson v. Harless,* 459 U.S. 4, 6 (1982) (quotation marks omitted).

Although Jennings established the factual basis to support his *Penry*-based prejudice argument, he did not provide the Texas Court of Criminal Appeals with a fair opportunity to consider the substance of his argument – he inserted it in a footnote at the end of his brief. *See Bridas SAPIC v. Gov't of Turkm.,* 345 F.3d 347, 356 n.7 (5th Cir. 2003) (holding that an argument raised only in a footnote of a brief is waived). Specifically, Jennings argued that:

> Had applicant's counsel introduced mitigating evidence of his mental impairment and disadvantaged background, and thereafter objected to the nullification instruction, this Court would be obligated to reverse the death sentence pursuant to *Abdul-Kabir v. Quarterman,* 550 U.S. [233] (2007); *Smith v. Texas,* 550 U.S. [297] (2007); and *Brewer v. Quarterman,* 550 U.S. [286] (2007). However, the jury could consider and give effect to applicant's mitigating evidence of good behavior while confined in jail in answering the future dangerousness special issue. *See Franklin v. Lynaugh,* 487 U.S. 164 (1988). Thus, the nullification instruction was superfluous under controlling Supreme Court precedent because counsel did not present and, thus, the jury was not called upon to

> consider and give effect to the mitigating evidence of applicant's mental impairment and disadvantaged background. In short, *Penry II* is not applicable.

This argument only vaguely alerted the state habeas court to his *Penry*-based prejudice argument and focused instead on arguing that *Penry II* is not applicable. This passing reference to his *Penry*-based prejudice argument during his state habeas proceedings does not suffice to exhaust his claim. As a result, Jennings is barred from asserting this claim in his federal habeas petition.

Because this claim is unexhausted and procedurally defaulted, Jennings cannot now rely on it to establish prejudice resulting from the failure to present background and mental-health mitigating evidence during the penalty phase. *See* 28 U.S.C. § 2254(b)(1).

D. Closing Argument

Jennings argues in a "cross-point" that his attorney provided ineffective assistance during his closing argument by conceding defeat and stating that he could not quarrel with the jury's decision to find him eligible for the death penalty. Before turning to the merits of Jennings' argument, this court must determine whether his claim is procedurally barred because he did not file a timely notice of appeal and filed a certificate of appealability ("COA") with this

court six months after the Director filed his notice of appeal.

A defendant generally must file a notice of appeal of a district court's denial of a federal habeas application within thirty days after the entry of final judgment. *See Bowles v. Russell,* 551 U.S. 205, 207 (2007); *see also* FED. R. APP. P. 4(a)(1)(A). When the opposing side appeals first, the party also seeking to appeal must do so "within 14 days after the date when the first notice was filed, or within the time otherwise prescribed by this Rule 4(a), whichever period ends later." FED. R. APP. P. 4(a)(3). Failure to file a notice of appeal deprives this court of jurisdiction to consider the appellant's claims. *See Bowles,* 551 U.S. at 206-07. Here, although the Director filed a timely notice of appeal, giving the court jurisdiction to consider two of Jennings' ineffective-assistance-of-counsel claims, Jennings did not file a notice of appeal concerning the claim the district court decided against his interest – the closing argument claim.

Jennings also failed to seek a COA from the district court first. The district court must first rule on a petitioner's COA request before this court has jurisdiction to consider it. *See Cardenas v. Thaler,* 651 F.3d 442, 443 (5th Cir. 2011). While the State may appeal a grant of habeas relief without seeking a COA, "a state prisoner seeking a writ of habeas corpus has no absolute entitlement to appeal a district court's denial of his petition" and "must first seek and obtain a COA." *Miller-El v. Cockrell,* 537

U.S. 322, 335-36 (2003) (*Miller-El I*) (citing 28 U.S.C. § 2253).

When the State appeals a grant of habeas relief, circuit courts of appeal [sic] are split on whether a petitioner can raise arguments in opposition to the state's appeal concerning grounds for relief not adopted by the district court without first seeking a COA. For instance, the Seventh Circuit views the COA requirement in 28 U.S.C. § 2253(c) as a gate-keeping function and therefore finds it unnecessary for a petitioner to seek a COA when an appeal is already before the court based on the state's appeal of a grant of habeas relief. *Szabo v. Walls,* 313 F.3d 392, 397 (7th Cir. 2002). The court held that Section 2253(c) "deals only with *appeals* by prisoners; it does not mention arguments by prisoners as *appellees* offered in support of relief they have obtained." *Id.* In contrast, the Second Circuit has held that "a habeas petitioner to whom the writ has been granted on one or more grounds may not assert, in opposition to an appeal by the state, any ground that the district court has not adopted unless the petitioner obtains a certificate of appealability permitting him to argue that ground." *Grotto v. Herbert,* 316 F.3d 198, 209 (2d Cir. 2003).

This circuit has rejected the idea that a State's appeal displaces Section 2253(c)'s gate-keeping function, and with it the requirement that a petitioner must seek a COA. *See Wiley v. Epps,* 625 F.3d 199, 204 n.2 (5th Cir. 2010). In *Wiley,* the district court granted habeas relief based on the petitioner's claim

that he was mentally retarded and ineligible for a death sentence as contemplated by *Atkins v. Virginia*, 536 U.S. 304 (2002). *Id.* at 202. The State appealed the district court's grant of habeas relief. *Id.* This court noted that the district court rejected the petitioner's other arguments in support of relief, but the petitioner had failed to file a notice of appeal or seek a COA as to those arguments. *Id.* at 204 n.2. As a result, the only issue before the court was the petitioner's *Atkins* claim. *Id.*

Jennings does not distinguish *Wiley* or argue in his brief that a notice of cross-appeal or COA is unnecessary to establish jurisdiction. A party seeking to invoke the court's jurisdiction must advance arguments establishing jurisdiction. *Hargrave v. Fibreboard Corp.*, 710 F.2d 1154, 1159 (5th Cir. 1983).

Jennings' "cross-point" is DISMISSED and his motion for a COA is DENIED. The judgment granting habeas relief is REVERSED, and judgment is RENDERED, denying habeas relief.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 12-70018

D.C. Docket No. 4:09-CV-219

ROBERT MITCHELL JENNINGS,

Petitioner-Appellee

v.

WILLIAM STEPHENS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION,

Respondent-Appellant

Appeal from the United States District Court
for the Southern District of Texas, Houston

Before STEWART, Chief Judge, SOUTHWICK and HAYNES, Circuit Judges.

JUDGMENT

(Filed Jul. 22, 2013)

This cause was considered on the record on appeal and was argued by counsel.

It is ordered and adjudged that the judgment of the District Court granting habeas relief is reversed and rendered, denying habeas relief.

ISSUED AS MANDATE:

A True Copy
Attest

Clerk, U.S. Court of Appeals,
Fifth Circuit

By: _____
Deputy

New Orleans, Louisiana

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 12-70018

ROBERT MITCHELL JENNINGS,

Petitioner-Appellee

v.

WILLIAM STEPHENS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION,

Respondent-Appellant

Appeal from the United States District Court
for the Southern District of Texas, Houston

ON PETITION FOR REHEARING

(Filed Aug. 15, 2013)

Before STEWART, Chief Judge, SOUTHWICK and HAYNES, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing is [DENIED]

ENTERED FOR THE COURT:

/s/ Leslie Southwick
United States Circuit Judge

Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

Scott S. Harris
Clerk of the Court
(202) 479-3011

March 24, 2014

Mr. Randolph L. Schaffer, Jr.
The Schaffer Firm
1301 McKinney
Suite 3100
Houston, TX 77010

Re: Robert Mitchell Jennings
v. William Stephens, Director, Texas Department of Criminal Justice, Correctional Institutions Division
No. 13-7211

Dear Mr. Schaffer:

The Court today entered the following order in the above-entitled case:

The motion of petitioner for leave to proceed *in forma pauperis* is granted. The petition for a writ of certiorari is granted limited to Question 4 presented by the petition.

Sincerely,

/s/ Scott S. Harris

Scott S. Harris, Clerk

PETITIONER'S BRIEF

American Bar Association
www.supremecourtpreview.org

No. 13-7211

IN THE

Supreme Court of the United States

ROBERT MITCHELL JENNINGS,
Petitioner,

v.

WILLIAM STEPHENS, DIRECTOR,
TEXAS DEPARTMENT OF CRIMINAL JUSTICE,
CORRECTIONAL INSTITUTIONS DIVISION,
Respondent.

On Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

BRIEF FOR THE PETITIONER

JEFFREY T. GREEN
ERIKA L. MYERS
JEFFREY S. BEKLAERT
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000
jgreen@sidley.com

RANDOLPH L. SCHAFFER, JR.
Counsel of Record
1301 McKinney, Ste. 3100
Houston, Texas 77010
(713) 961-9655
nogult@swbell.net

Counsel for Petitioner

June 6, 2014

QUESTION PRESENTED

Whether a federal habeas petitioner who prevailed in the district court on an ineffective assistance of counsel claim must file a separate notice of appeal and motion for a certificate of appealability to raise an allegation of deficient performance that the district court rejected even though the court of appeals acquired jurisdiction over the entire claim as a result of the respondent's appeal.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
JURISDICTION	1
RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS AND RULES	1
INTRODUCTION	1
STATEMENT OF THE CASE	3
A. State Proceedings	3
B. Federal Proceedings	5
SUMMARY OF THE ARGUMENT	7
ARGUMENT	9
I. A FEDERAL HABEAS PETITIONER WHO IS THE APPELLEE DOES NOT HAVE TO CROSS-APPEAL OR OBTAIN A CERTIFICATE OF APPEALABILITY TO RAISE AN ALTERNATIVE GROUND FOR AFFIRMANCE	9
A. Petitioner Did Not Have To Cross-Appeal In Order To Raise An Alternate Argument Supporting The Judgment	9
B. Petitioner Did Not Have To Obtain A Certificate Of Appealability Pursuant To 28 U.S.C. § 2253(c)	18
C. Petitioner Did Not Have To Obtain A Certificate Of Appealability Pursuant To Federal Rule Of Appellate Procedure 22(b) Or Habeas Corpus Rule 11(a)	23

TABLE OF CONTENTS—continued

Page

II. A FEDERAL HABEAS PETITIONER WHO PREVAILED IN THE DISTRICT COURT ON AN INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM DOES NOT HAVE TO OBTAIN A CERTIFICATE OF APPEALABILITY TO RAISE AN ALLEGATION OF DEFICIENT PERFORMANCE THAT THE DISTRICT COURT REJECTED WHERE THE DISTRICT COURT DID NOT ENTER A FINAL ORDER ADVERSE TO HIM 26

A. Petitioner Did Not Have To Obtain A Certificate of Appealability On The Rejected Allegation Of Deficient Performance Where He Received In The Judgment All The Relief That He Requested On His Ineffective Assistance Of Counsel Claim 26

B. The Fifth Circuit Had Jurisdiction To Issue A Certificate Of Appealability, If Necessary, Even Though Petitioner Did Not Request One From The District Court 34

CONCLUSION 37

ADDENDUM

U.S. Const. amend. VI 1a

U.S. Const. amend. XIV 2a

28 U.S.C. § 2253(c) 3a

Fed. R. App. P. 3(a)(1) 4a

Fed. R. App. P. 4(a)(3) 5a

Fed. R. App. P. 22(b) 6a

TABLE OF CONTENTS—continued

Page

Rules Governing § 2254 Cases, Rule 11(a), 28 U.S.C. foll. § 2254 ..... 7a

TABLE OF AUTHORITIES

Page(s)

CASES

Berryman v. *Morton*, 100 F.3d 1089 (3d Cir. 1996) 33
Bowles v. *Russell*, 551 U.S. 205 (2007) 15
Carcieri v. *Salazar*, 555 U.S. 379 (2009) 21
Cardenas v. *Thaler*, 651 F.3d 442 (5th Cir. 2011) 34, 35
Conn. Nat'l Bank v. *Germain*, 503 U.S. 249 (1992) 18
Deposit Guaranty Nat'l Bank v. *Roper*, 445 U.S. 326 (1980) 17
Drax v. *Reno*, 338 F.3d 98 (2d Cir. 2003) ... 14
El Paso Natural Gas Co. v. *Neztsosie*, 526 U.S. 473 (1999) 12, 13
Ex parte Jennings, Nos. AP-75806, AP-75807, 2008 WL 5049911 (Tex. Crim. App. Nov. 26, 2008) 3, 4
Ferrell v. *Hall*, 640 F.3d 1199 (11th Cir. 2011) 33
French v. *Estelle*, 692 F.2d 1021 (5th Cir. 1982) 15
Gonzalez v. *Thaler*, 132 S. Ct. 641 (2012) 19, 22, 23, 24, 25, 34, 35
Goodman v. *Bertrand*, 467 F.3d 1022 (7th Cir. 2006) 33
Greenlaw v. *United States*, 554 U.S. 237 (2008) 35
Grotto v. *Herbert*, 316 F.3d 198 (2d Cir. 2003) 21, 27
Herceg v. *Hustler Magazine, Inc.*, 814 F.2d 1017 (5th Cir. 1987) 15
Hogue v. *Johnson*, 131 F.3d 466 (5th Cir. 1997) 16
Jaffke v. *Dunham*, 352 U.S. 280 (1957) 12

TABLE OF AUTHORITIES—continued

Page(s)

Jones v. *Bernanke*, 557 F.3d 670 (D.C. Cir. 2009) 17

Jordan v. *Duff & Phelps, Inc.*, 815 F.2d 429 (7th Cir. 1987) 17

Kessler v. *Nat'l Enters., Inc.*, 203 F.3d 1058 (8th Cir. 2000) 17

Kimmelman v. *Morrison*, 477 U.S. 365 (1986) 30

Kyles v. *Whitley*, 514 U.S. 419 (1995) 30, 32

Lancaster v. *Adams*, 324 F.3d 423 (6th Cir. 2003) 20

Lawhorn v. *Allen*, 519 F.3d 1272 (11th Cir. 2008) 21, 28

Manokey v. *Waters*, 390 F.3d 767 (4th Cir. 2004) 21, 27

Md. Cas. Co. v. *State Bank & Trust Co.*, 425 F.2d 979 (5th Cir. 1970) 15

Mass. Mut. Life Ins. Co. v. *Ludwig*, 426 U.S. 479 (1976) 12

Matter of Sims, 994 F.2d 210 (5th Cir. 1993) 17

McMann v. *Richardson*, 397 U.S. 759 (1970) 29

Miller-El v. *Cockrell*, 537 U.S. 322 (2003) 19

Missouri v. *Frye*, 132 S. Ct. 1399 (2012) 30

Moore v. *Johnson*, 194 F.3d 586 (5th Cir. 1999), *superseded on other grounds by statute*, Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 33

Morley Co. v. *Md. Cas. Co.*, 300 U.S. 185 (1937) 12

Neverson v. *Farquharson*, 366 F.3d 32 (1st Cir. 2004) 14

Padilla v. *Kentucky*, 559 U.S. 356 (2010) 30

TABLE OF AUTHORITIES—continued

Page(s)

Powell v. *Alabama*, 287 U.S. 45 (1932) 29
Ramirez v. *Castro*, 365 F.3d 755 (9th Cir. 2004) 14
Rios v. *Garcia*, 390 F.3d 1082 (9th Cir. 2004) 28
Rodrigues v. *Hole*, 928 F.2d 534 (2d Cir. 1991) 33
Roe v. *Flores-Ortega*, 528 U.S. 470 (2000) ... 29
Roman v. *Abrams*, 790 F.2d 244 (2d Cir. 1986) 21
Rubin v. *United States*, 449 U.S. 424 (1981) 18
Slack v. *McDaniel*, 529 U.S. 473 (2000) 19, 22, 24
Stauffer v. *Reynolds*, 168 F.3d 1155 (10th Cir. 1999) 33
Strickland v. *Washington*, 466 U.S. 668 (1984) 8, 29, 30, 31, 32
Szabo v. *Walls*, 313 F.3d 392 (7th Cir. 2002) 19, 20, 21, 23
United States ex rel. Tillery v. *Cavell*, 294 F.2d 12 (3d Cir. 1961) 22
United States v. *Agurs*, 427 U.S. 97 (1976) 32
United States v. *Am. Ry. Express Co.*, 265 U.S. 425 (1924) 10, 11
United States v. *Bagley*, 473 U.S. 667 (1985) 32
United States v. *Hilger*, 867 F.2d 566 (9th Cir. 1989) 13
United States v. *Raines*, 362 U.S. 17 (1960) 12
United States v. *Ritter*, 416 F.3d 256 (3d Cir. 2005) 13, 14
Wiley v. *Epps*, 625 F.3d 199 (5th Cir. 2010) 21, 27

TABLE OF AUTHORITIES—continued

Page(s)

Wright v. *Lafler*, 247 F. App'x 701 (6th Cir. 2007) 24, 34

CONSTITUTIONAL PROVISIONS

U.S. Const. amend. VI. 29
U.S. Const. amend. XIV. 29

STATUTES

28 U.S.C. § 2106 36
28 U.S.C. § 2253 ..... 2, 7, 18, 21
Act of June 25, 1948, ch. 646, 62 Stat. 967 (current version at 28 U.S.C. § 2253 (1996)) 22
Act of Sept. 28, 1976, Pub. L. No. 94-426, 90 Stat. 1334 25

RULES

Fed. R. App. P. 3(a)(1) 9, 16
Fed. R. App. P. 4(a)(3) 9, 16
Fed. R. App. P. 22(b) 23, 24
Rules Governing § 2254 Cases, Rule 11, 28 U.S.C. foll. § 2254 ..... 25, 34

OTHER AUTHORITIES

H.R. Rep. No. 104-518 (1996) (Conf. Rep.) 22
Report of the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, 43 F.R.D. 61 (1967) 23, 24
15A Charles Alan Wright & Arthur Miller, *Federal Practice and Procedure* § 3904 (2d ed.) 11, 12, 13, 35

OPINIONS BELOW

The decision of the United States Court of Appeals for the Fifth Circuit and the order denying rehearing are not reported. The decision is reprinted in the Joint Appendix (J.A.) at 41-68, and the order denying rehearing is reprinted at J.A. 71-72. The district court's memorandum and order is not reported. It is reprinted at J.A. 16-34.

JURISDICTION

The Fifth Circuit reversed the judgment granting habeas corpus relief on July 22, 2013 (J.A. 68-70), and denied rehearing on August 15, 2013 (J.A. 71-72). Petitioner filed a timely petition for a writ of certiorari on October 28, 2013. This Court granted review limited to Question Four on March 24, 2014 (J.A. 73). This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1). Petitioner initially invoked federal jurisdiction pursuant to 28 U.S.C. § 2254(a).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS AND RULES

The relevant constitutional and statutory provisions and rules are reproduced in the Addendum 1a-7a.

INTRODUCTION

A federal habeas petitioner who prevailed in the district court need not cross-appeal or obtain a certificate of appealability to raise an alternate ground for affirming the district court's judgment. The Fifth Circuit erred in holding to the contrary. It is black-letter law that a party need not cross-appeal to raise an argument that would support the district court's judgment, even if the district court's ruling rested on

other grounds. Rather, the appellee must cross-appeal only when he seeks to enlarge the judgment in his favor.

Likewise, the appellee need not obtain a certificate of appealability (COA) to raise an alternate ground of affirmance. Title 28 U.S.C. § 2253(c)(1) provides that, "[u]nless a circuit justice or judge issues a certificate of appealability, *an appeal may not be taken* to the court of appeals from . . . the final order in a habeas corpus proceeding . . . ." (emphasis added). The statute plainly states that a COA is required for a habeas petitioner *to take an appeal*. Neither the statute nor the associated rules require a habeas petitioner who is the appellee to obtain a COA to raise an alternate argument supporting the *relief* that he obtained in the district court.

Additionally, even if a habeas petitioner must obtain a COA to raise a different claim from the one that he prevailed upon in the district court, none was needed in this case. Petitioner merely raised an additional argument in support of the same claim that the district court decided in his favor. He prevailed upon an ineffective assistance of counsel claim based on two allegations of deficient performance at the punishment phase. In the court of appeals, he raised a third allegation of deficient performance at the punishment phase to support the relief that he received in the judgment. This Court's precedent makes clear that ineffective assistance of counsel is a single claim that is based on one or more deficiencies in performance. Therefore, petitioner did not have to obtain a COA to raise the third allegation of deficient performance because the entire claim was before the court of appeals as a result of respondent's appeal. The Fifth Circuit's decision should be reversed.

STATEMENT OF THE CASE

A. State Proceedings

Petitioner was convicted of capital murder, and the State sought the death penalty (J.A. 17). During the punishment phase, the State introduced evidence of his criminal history and prison disciplinary violations. *Id.* In response, defense counsel only called the jail chaplain, who testified that petitioner was not "incorrigible" (J.A. 43). Counsel failed to present any other mitigating evidence. *Id.*

Counsel failed to review the district clerk's files from petitioner's prior convictions, and to discover a report of a psychological evaluation reflecting that petitioner demonstrated mild mental retardation and organic brain dysfunction in 1978 (although the psychologist surmised that he was malingering) (J.A. 26-27). Counsel also failed to request a psychological evaluation (J.A. 28). Testing conducted during the state habeas proceeding revealed abnormal findings in petitioner's frontal lobes and left temporal lobes that supported the contention that his brain had been injured. *See Ex parte Jennings*, Nos. AP-75808, AP-75807, 2008 WL 5049911, at *3 (Tex. Crim. App. Nov. 26, 2008). A psychologist concluded that petitioner suffers from periods in which impulsive action overcomes his capacity for reason and foresightful action; that his capacity for emotional control and self-inhibition is less than that of an unimpaired person; that his condition has a demonstrable physical basis; and that these findings could have been made in 1989 had he been tested. *See id.*

Counsel also failed to present testimony that petitioner's mother conceived him as a result of a rape at age 16; that she frequently told him that she did not want him and could not complete her education be-

cause of him; that he lived with various relatives during childhood and had no positive male influence; that he and his younger sister lived in an apartment, supervised by an older cousin, during the week; that his mother used drugs when she came home on the weekends; that he lived in poverty and had only the bare essentials; that he received little adult supervision or love; and that he did poorly in special education classes, dropped out of school in the ninth grade, and began to use drugs at a very early age. *Ex parte Jennings*, 2008 WL 5049911, at *4 n.14.

During his closing argument at the punishment phase, counsel told the jury: "I feel like I ought to just sit down. Shoot, you twelve people know what the evidence is. You've heard it. You've probably already decided what you're going to do with Jennings in this case." 39 Trial Reporter's Record (T.R.R.) 234. And if the jury could not see some way to spare his life, counsel added, "I can't quarrel with that." 39 T.R.R. 239-40.

Based on the jury's answers to the statutory special issues, the court sentenced petitioner to death on July 13, 1989. The Texas Court of Criminal Appeals (TCCA) affirmed the conviction in an unpublished opinion issued on January 19, 1993. This Court denied certiorari on October 4, 1993. *Jennings v. State*, No. AP-70911 (Tex. Crim. App. Jan 19, 1993), *cert. denied*, 510 U.S. 830 (1993).

Petitioner filed a state habeas corpus application on September 20, 1996. The trial court entered findings of fact and conclusions of law recommending that relief be denied on January 22, 2008. The TCCA denied relief in an unpublished opinion issued on November 26, 2008. This Court denied certiorari on April 27, 2009. *Ex parte Jennings*, 2008 WL 5049911, *cert. denied*, 556 U.S. 1209 (2009).

B. Federal Proceedings

Petitioner filed a federal habeas corpus petition on January 27, 2009. He presented one claim of ineffective assistance of counsel (IAC) at the punishment phase. As relief, he requested only a new sentencing hearing. He alleged that the state court acted unreasonably in rejecting his IAC claim, as his counsel performed deficiently in three respects. First, counsel failed to discover and present mitigating evidence of petitioner's mental impairment. Second, counsel failed to present mitigating evidence of petitioner's disadvantaged background. Finally, counsel argued during summation, in essence, that he could not quarrel with a death sentence. On April 23, 2012, the district court issued a memorandum and order holding that the state court unreasonably concluded that counsel was not ineffective in failing to present mitigating evidence of petitioner's mental impairment and disadvantaged background but reasonably concluded that counsel's closing argument was based on a plausible strategy (J.A. 25-32). The district court entered a judgment in petitioner's favor, granting him all the relief that he requested by ordering a new sentencing hearing (J.A. 33-34).

Respondent filed a notice of appeal from the district court's "memorandum and order and final judgment . . . conditionally granting habeas relief to Petitioner . . . ." (J.A. 36-37). Respondent argued in his brief in the Fifth Circuit that the district court erred in failing to defer to the state court findings and conclusions that counsel made reasonable decisions not to investigate petitioner's mental condition and not to present evidence of his disadvantaged background. Brief of Respondent-Appellant at 62-71, *Jennings* v. *Thaler*, No. 12-70018 (5th Cir. Aug. 31, 2012).

Petitioner defended the district court's judgment in his brief. He argued that the district court correctly held that counsel performed deficiently in failing to present mitigating evidence of mental impairment and disadvantaged background. In a cross-point in support of the judgment, he also argued that counsel performed deficiently in making the affirmatively prejudicial closing argument. Brief of Petitioner-Appellee at 51-53, *Jennings* v. *Thaler*, No. 12-70018 (5th Cir. Oct. 26, 2012).

Respondent argued in his reply brief that the Fifth Circuit lacked jurisdiction to consider the cross-point because petitioner did not request or obtain a COA to challenge the district court's ruling.[1] Reply Brief of Respondent-Appellant at 27, *Jennings* v. *Thaler*, No. 12-70018 (5th Cir. Nov. 27, 2012). Two days later, petitioner filed a motion requesting that the Fifth Circuit issue a COA, if necessary, on one aspect of the IAC claim: "whether the district court erred in upholding the state court decision that trial counsel was not ineffective in arguing that he could not quarrel with a death sentence" (J.A. 38-40).[2] The Fifth Circuit, recognizing a circuit split on whether a federal habeas petitioner "can raise arguments in opposition to the state's appeal concerning grounds for relief not adopted by the district court without first seeking a

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[1] Respondent did not assert that the Fifth Circuit lacked jurisdiction because petitioner failed to file a separate notice of appeal. Reply Brief of Respondent-Appellant at 27-28, *Jennings* v. *Thaler*, No. 12-70018 (5th Cir. Nov. 27, 2012).

[2] Petitioner reserved the argument in the motion that an appellee need not obtain a COA to challenge the district court's denial of relief on a rejected allegation of deficient performance where the district court sustained the IAC claim, the respondent appealed, and the claim was before the court of appeals (J.A. 39).

COA," held that it lacked jurisdiction to consider the cross-point because petitioner did not timely file a notice of appeal and move for a COA in the district court (J.A. 65-66). It dismissed the cross-point and reversed the judgment on July 22, 2013 (J.A. 68), and denied rehearing on August 15, 2013 (J.A. 71-72); *see also Jennings v. Stephens*, 537 F. App'x 326 (5th Cir. 2013).

SUMMARY OF THE ARGUMENT

I. A federal habeas petitioner who prevailed in the district court does not have to appeal or obtain a COA to raise alternative arguments supporting the judgment. It is a longstanding and firmly established rule that a party need not (and should not) cross-appeal to raise alternative grounds for affirming the judgment. Rather, the appellee must cross-appeal only where he seeks to expand the judgment in his favor. Here, petitioner did not seek to expand the judgment in his favor. The judgment ordered that he receive a new sentencing hearing, and his alternative argument would have entitled him to no different or additional relief.

Petitioner likewise did not need to obtain a COA. The plain language of 28 U.S.C. § 2253(c)(1)(A) requires a COA only for "an appeal" to "be taken" by a habeas petitioner. Neither the statute nor the associated rules require a habeas petitioner to obtain a COA to raise particular arguments as the appellee. Nor do the statute or rules purport to change the standards governing when an appeal must be taken. Petitioner did not need to appeal and, indeed, could not have appealed the judgment in his favor. Therefore, he did not need to obtain a COA to raise an alternative ground for affirmance.

II. Even if a COA is required when a habeas petitioner who is the appellee seeks to raise a different claim from the claim that he prevailed upon, it is not required when the district court's judgment granted him all the relief that he requested on a single claim. In *Strickland* v. *Washington*, 466 U.S. 668 (1984), this Court established that ineffective assistance of counsel is a single claim with a deficient performance prong and a prejudice prong. Petitioner alleged three instances of deficient performance to support his single IAC claim. Because each allegation of deficient performance provided an alternate ground for the court of appeals to affirm the district court's judgment on the claim, he did not need to obtain a COA. No statute or rule requires a habeas petitioner who is the appellee to obtain a COA on a rejected allegation of deficient performance that is part of an IAC claim where the district court did not enter a final order adverse to him, he did not take the appeal, and he does not seek to expand the relief granted in the judgment.

Finally, even if petitioner were required to obtain a COA, the Fifth Circuit had jurisdiction to issue the COA in the first instance or should have remanded to the district court for the limited purpose of considering whether to issue a COA. The Fifth Circuit's conclusion that it lacked jurisdiction to issue a COA is not supported by statute, rule, or case law.

ARGUMENT

I. A FEDERAL HABEAS PETITIONER WHO IS THE APPELLEE DOES NOT HAVE TO CROSS-APPEAL OR OBTAIN A CERTIFICATE OF APPELABILITY TO RAISE AN ALTERNATIVE GROUND FOR AFFIRMANCE.

A. Petitioner Did Not Have To Cross-Appeal In Order To Raise An Alternate Argument Supporting The Judgment.

Because the district court entered a judgment entirely in petitioner's favor, he did not need to appeal to raise an argument in support of that judgment. Indeed, any appeal by petitioner would have been improper. An appeal from a district court to a court of appeals "may be taken" only by timely filing a notice of appeal with the district clerk. Addendum 4a (Fed. R. App. P. 3(a)(1)). "If one party timely files a notice of appeal, any other party may file a notice of appeal within 14 days after the date when the first notice was filed . . . ." Addendum 5a (Fed. R. App. P. 4(a)(3)). Respondent "took an appeal" when he filed a notice of appeal from the district court's "memorandum and order and final judgment . . . conditionally granting habeas relief to Petitioner . . . " (J.A. 36).

Petitioner did not "take an appeal" and did not need to do so to raise his alternate argument supporting the judgment. A federal habeas petitioner who is the appellee and does not seek to expand the relief granted in the judgment does not have to file a separate notice of appeal. Here, the district court's final judgment read in its entirety: "Jennings's Petition for a writ of Habeas Corpus (Docket Entry 1) is Granted. Thaler shall release Jennings from custody unless, within 120 days, the State of Texas grants Jennings a

new sentencing hearing or resentences him to a term of imprisonment as provided by Texas law at the time of Jennings' crime. Thaler's Motion for Summary Judgment (Docket Entry 6) is Denied." (J.A. 35). This judgment was entirely in petitioner's favor and granted him all the relief that he requested—a new sentencing hearing (J.A. 33-35).

Petitioner sought to raise an alternate argument in the Fifth Circuit that counsel performed deficiently during the closing argument at the punishment phase. This alternate argument, if accepted, would not have entitled petitioner to any additional or different relief than the district court granted him and would not have required any alteration of the district court's judgment. It was simply an alternate argument supporting the judgment that he receive a new sentencing hearing. Therefore, under well-established law, he did not need to cross-appeal to raise the argument.

This Court's seminal decision in *United States* v. *American Ry. Express Co.*, 265 U.S. 425 (1924), established that an appellee need not file a cross-appeal to raise an argument in support of the judgment. The Southeastern Express Company instituted a proceeding against the American Railway Express Company before the Interstate Commerce Commission (ICC) in an effort to establish certain routes and joint rates. *Id.* at 428. The ICC ordered the establishment of some of the routes. *Id.* at 429. Before the effective date of the order, American Railway filed a lawsuit against the United States to enjoin its enforcement, and Southeastern Express intervened. *Id.* at 430. The district court held that the order was void and granted a temporary injunction. *Id.* The United States appealed. *Id.* American Railway did not file a cross-appeal but argued additional grounds in sup-

port of the judgment that the district court had rejected. This Court held that it could consider these grounds because American Railway, instead of attacking the order granting the temporary injunction, "merely assert[ed] additional grounds why the decree should be affirmed." *Id.* at 436. Justice Brandeis articulated the rationale as follows:

> It is true that a party who does not appeal from a final decree of the trial court cannot be heard in opposition thereto when the case is brought there by the appeal of the adverse party. In other words, the appellee may not attack the decree with a view either to enlarging his own rights thereunder or of lessening the rights of his adversary, whether what he seeks is to correct an error or to supplement the decree with respect to a matter not dealt with below. But it is likewise settled that *the appellee may, without taking a cross-appeal, urge in support of a decree any matter appearing in the record, although his argument may involve an attack upon the reasoning of the lower court* or an insistence upon matter overlooked or ignored by it. By the claims now in question, the American does not attack, in any respect, the decree entered below. It merely asserts additional grounds why the decree should be affirmed. These grounds will be examined.

Id. at 435-36 (emphasis added).

In the decades since *American Railway*, "[m]any cases" have followed it and "state[d] the general rule that a cross-appeal is required to support modification of the judgment, but that arguments that support the judgment as entered can be made without a cross-appeal." 15A Charles Alan Wright & Arthur

Miller, *Federal Practice and Procedure* § 3904 (2d ed.). Indeed, in *Massachusetts Mutual Life Insurance Co.* v. *Ludwig*, 426 U.S. 479 (1976), this Court referred to the rule of *American Railway* as "inveterate and certain." *Id.* at 480 (quoting *Morley Co.* v. *Md. Cas. Co.*, 300 U.S. 185, 191 (1937)).

Further, many cases support *American Railway*'s holding that a "[c]ross appeal is unnecessary even with respect to matters that have been put aside by the district court, or matters that have been explicitly rejected by the district court." Wright & Miller, *supra*, § 3904. For instance, in *Jaffke* v. *Dunham*, 352 U.S. 280 (1957), the court of appeals reversed an order in favor of a prevailing bankruptcy claimant/appellee and refused to consider the district court's action in striking an affidavit from the record because the appellee did not cross-appeal. This Court remanded the case to the court of appeals to consider the merits pursuant to *American Railway*. "If the District Court was in error in striking an admissible affidavit, a cross-appeal was not a prerequisite for the Court of Appeals to rule on the admissibility of the affidavit, and finding it admissible, to find that it afforded evidence in support of the District Court judgment." *Id.* at 308-09; *see also United States* v. *Raines*, 362 U.S. 17, 27 n.7 (1960) ("[S]ince the judgment of the District Court awarded appellees all the relief they requested (despite rejecting most of their contentions . . . .), no cross-appeal was necessary to bring these contentions before us . . . .").

By contrast, in *El Paso Natural Gas Co.* v. *Neztsosie*, 526 U.S. 473 (1999), this Court held that the appellees were required to file a cross-appeal where they sought to expand the scope of the district court's judgment. The district court granted preliminary injunctions on some claims and denied them on

others. The appellant appealed the denied injunctions, but the appellees did not cross-appeal the granted injunctions. The court of appeals affirmed. This Court held that appellee's challenge to the granted injunctions was not properly before the court of appeals because the appellees were required to file a cross-appeal where they sought to enlarge their rights by asking the court of appeals to overturn the granted injunctions as well. *Id.* at 479-80. The cross-appeal requirement "is meant to protect institutional interests in the orderly functioning of the judicial system, by putting opposing parties and appellate courts on notice of the issues to be litigated and encouraging repose of those that are not." *Id.* at 481-82. This interest is satisfied as long as a cross-appeal is taken when the appellee seeks to change the judgment. Wright & Miller, *supra*, § 3904.

Lower federal courts have routinely applied the *American Railway* rule in criminal cases. In *United States* v. *Hilger*, 867 F.2d 566 (9th Cir. 1989), the defendant moved to dismiss the indictment on five grounds. The district court granted the motion on two grounds but rejected the other three. The government appealed, and the defendant raised the rejected grounds without filing a cross-appeal. The court of appeals held that it could consider the rejected grounds because the defendant was not "trying to obtain more relief from the court of appeals than he received from the district court," but was "merely trying to defend the relief he has been granted—dismissal of the indictment—on a ground other than that relied upon by the district court. This he clearly may do." *Id.* at 567. It upheld the dismissal of the indictment on a ground that the district court rejected. Likewise, in *United States* v. *Ritter*, 416 F.3d 256 (3d Cir. 2005), the district court granted a motion to

suppress, and the government appealed. The appellees were allowed to challenge the district court's determination that there was probable cause to issue the search warrant without filing a cross-appeal because they attacked "the District Court's reasoning, not the result achieved . . . ." *Id.* at 262 n.6.

Habeas cases are no exception to the *American Railway* rule. In *Drax* v. *Reno*, 338 F.3d 98 (2d Cir. 2003), the government appealed the district court's grant of habeas relief to an alien who was ordered deported based on his criminal convictions. The alien did not cross-appeal the denial of relief on another ground but argued it in his appellate brief. The court of appeals considered the argument because it was "inextricably intertwined with the relief ultimately granted by the District Court." *Id.* at 105-06. Similarly, in *Neverson* v. *Farquharson*, 366 F.3d 32 (1st Cir. 2004), the district court concluded that a habeas corpus petition was timely filed under the doctrine of equitable tolling but denied relief on the merits. The court of appeals allowed the warden/appellee to challenge the equitable tolling decision without filing a cross-appeal because he was defending the dismissal of the petition on an alternate ground that appeared in the record. A cross-appeal was unnecessary because the district court granted the appellee all the relief that he requested—dismissal of the petition with prejudice. *Id.* at 39; *see also Ramirez* v. *Castro*, 365 F.3d 755, 762 (9th Cir. 2004) (where district court grants habeas relief, court of appeals can affirm on any ground supported by record, even if it differs from rationale of district court). It would plainly be inequitable to apply a different cross-appeal rule to a habeas petitioner than to a warden.

Here, the Fifth Circuit held that the absence of a cross-appeal deprived it of jurisdiction to consider the

rejected allegation of deficient performance pursuant to *Bowles* v. *Russell*, 551 U.S. 205 (2007). Its reliance on *Bowles* was misplaced. Bowles, the appellant, did not timely file a notice of appeal in reliance on the district court's order that misstated the filing deadline. This Court held that a timely notice of appeal is a jurisdictional requirement in a civil case. *Id.* at 214. The court of appeals never acquired jurisdiction in the absence of a timely notice of appeal. *Id.* at 215.

By contrast, respondent timely filed a notice of appeal in petitioner's case, and the Fifth Circuit therefore acquired jurisdiction over the case. *Bowles* did not address, much less overrule, the *American Railway* rule that a cross-appeal is not required to enable the court of appeals to consider the appellee's arguments in support of the judgment where he does not seek to expand the relief granted. Because the Fifth Circuit acquired jurisdiction by virtue of respondent's notice of appeal, it could affirm the judgment granting a new sentencing hearing based on any argument made in the district court without a cross-appeal.[3]

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[3] The Fifth Circuit did not acknowledge the *American Railway* rule or its own precedent that supports petitioner's position. It previously applied the *American Railway* rule in *Md. Casualty Co.* v. *State Bank & Trust Co.*, 426 F.2d 979, 982 (5th Cir. 1970). In *French* v. *Estelle*, 602 F.2d 1231 (5th Cir. 1979), it allowed a federal habeas petitioner/appellee who prevailed in the district court on a claim of ineffective assistance of appellate counsel to raise a claim of insufficient evidence to prove the prior convictions alleged for enhancement of punishment, despite the absence of a cross-appeal, because it could affirm the grant of relief on any ground supported by the record. *Id.* at 1234 n.5. Thereafter, it cited this footnote with approval in a civil case. *See Herceg* v. *Hustler Magazine, Inc.*, 814 F.2d 1017, 1023 n.39 (5th Cir. 1987). Contrary to this precedent, it refused to consider petitioner's rejected allegation of deficient performance notwithstanding its internal rule that a panel must follow a prior panel opinion absent an intervening decision to the contrary by the

Under the firmly established precedent governing cross-appeals, a habeas petitioner who is the appellee need not cross-appeal unless he seeks to enlarge the relief granted by the district court. Rule of Appellate Procedure 3(a)(1) applies to the appellant. Rule of Appellate Procedure 4(a)(3) applies to an appellee who seeks to expand the relief granted in the judgment. A federal habeas petitioner seeks an order or conditional order that the state release him from custody based on one or more federal constitutional violations. He may assert that he should be acquitted because the evidence was legally insufficient; that the indictment should be dismissed because the penal statute is unconstitutional or there was a double jeopardy or speedy trial violation; or that he should receive a new trial based on constitutional error committed at the guilt-innocence phase or a new sentencing hearing based on constitutional error committed at the punishment phase.

If, for example, a district court orders that the petitioner is entitled to a new sentencing hearing based on IAC but rejects a separate claim, the respondent appeals, and the petitioner/appellee wants to raise the rejected claim, he must file a cross-appeal under Rule 4(a)(3) and *American Railway* and its progeny if he seeks an order that ultimately would result in an acquittal, dismissal of the indictment, or a new trial. However, if he wants to raise a rejected claim that would entitle him only to a new sentencing hearing—the same relief granted in the judgment—he need not file a cross-appeal.

Supreme Court or the en banc court. *See Hogue v. Johnson*, 131 F.3d 466, 481 (5th Cir. 1997).

Thus, petitioner did not have to file a cross-appeal to raise a rejected allegation of deficient performance on an IAC claim on which he prevailed in the district court because a favorable ruling by the Fifth Circuit would not have expanded the relief granted in the district court's judgment. Indeed, he *could not* properly have taken a cross-appeal, because the district court granted all the relief that he requested and entered a judgment entirely in his favor. "It is more than well-settled that a party cannot appeal from a judgment unless 'aggrieved' by it" and that "a party who has obtained a judgment in his favor, granting the relief sought, is not aggrieved by it." *Matter of Sims*, 994 F.2d 210, 214 (5th Cir. 1993) (citing *Deposit Guaranty Nat'l Bank* v. *Roper*, 445 U.S. 326, 333-34 (1980)).

Petitioner's position is consistent with sound judicial policy that disfavors unnecessary cross-appeals. Judge Easterbrook stated this policy succinctly in *Jordan* v. *Duff & Phelps, Inc.*, 815 F.2d 429 (7th Cir. 1987):

> Cross-appeals for the sole purpose of making an argument in support of the judgment are worse than unnecessary. They disrupt the briefing schedule, increasing from three to four the number of briefs, and they make the case less readily understandable to the judges. The arguments will be distributed over more papers, which also tend to be longer. Unless a party requests the alteration of the judgment in its favor, it should not file a notice of appeal.

Id. at 439; *see also, e.g.*, *Jones* v. *Bernanke*, 557 F.3d 670, 676 (D.C. Cir. 2009) (same); *Kessler* v. *Nat'l Enters., Inc.*, 203 F.3d 1058, 1059 (8th Cir. 2000) (a rule that forces appellees "to file every conceivable protec-

tive cross-appeal" would "needlessly increas[e] the scope and complexity of initial appeals.").

Thus, the Fifth Circuit erred in holding that it lacked jurisdiction to consider the rejected allegation that counsel performed deficiently during the closing argument in the absence of a cross-appeal.

B. Petitioner Did Not Have To Obtain A Certificate Of Appealability Pursuant To 28 U.S.C. § 2253(c).

Likewise, a habeas petitioner who is an appellee need not obtain a certificate of appealability in order to raise an alternative ground for affirmance. Title 28 U.S.C. § 2253(c)(1) provides, "[u]nless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from . . . the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court . . . ." Addendum 3a (28 U.S.C. § 2253(c)).

The statutory text unambiguously states that, in the absence of a COA, "an appeal may not be taken." *Id.* Thus, a COA (as the very name "certificate of appealability" suggests) is required for a habeas petitioner *to take an appeal*. When the words of a statute are unambiguous, "judicial inquiry is complete." *Conn. Nat'l Bank* v. *Germain*, 503 U.S. 249, 254 (1992) (quoting *Rubin* v. *United States*, 449 U.S. 424, 430 (1981)). Courts "must presume that a legislature says in a statute what it means and means in a statute what it says there." *Id.* at 253-54. The words of § 2253(c) unambiguously require a COA only for a habeas petitioner who is the appellant, not for a habeas petitioner who is the appellee.

Section 2253(c) does not apply to petitioner because he received all the relief that he requested in the dis-

trict court and, therefore, did not "take an appeal" to the court of appeals pursuant to subsection (c)(1)(A). The statute does not require a petitioner who is the appellee to obtain a COA to enable the court of appeals to address an argument made in support of an issue over which it has acquired jurisdiction by virtue of the respondent's appeal. Had Congress so intended, it would have provided in subsection (c)(3) that any party whose arguments were rejected must obtain a COA on the "specific argument or arguments," instead of the "specific issue or issues," in order to satisfy the "substantial showing of the denial of a constitutional right" required by subsection (c)(2). Addendum 3a.

Interpreting § 2253(c) to require a COA only when the habeas petitioner is the appellant also is consistent with *Miller-El* v. *Cockrell*, 537 U.S. 322 (2003). In *Miller-El*, this Court held that "[b]efore an appeal may be entertained, a prisoner who was *denied habeas relief* in the district court must first seek and obtain a COA from a circuit justice or judge . . . [U]ntil a COA has been issued, federal courts of appeals lack jurisdiction to rule on the merits of *appeals from habeas petitioners*." 537 U.S. at 335-36; *see Gonzalez* v. *Thaler*, 132 S. Ct. 641, 649 (2012) (same). Thus, § 2253(c) requires a COA only when a habeas petitioner who has been denied relief seeks to take an appeal. As this Court held in *Slack* v. *McDaniel*, 529 U.S. 473, 483 (2000), the appeal and COA requirements are so tightly linked that courts "should . . . treat[] [a] notice of appeal as an application for a COA" when a separate application is not filed. *Id.* at 483.

While the lower courts are split on this issue, Judge Easterbrook wrote the most thoughtful opinion on the subject in *Szabo* v. *Walls*, 313 F.3d 392 (7th Cir.

2002), concluding that a COA is not required when the habeas petitioner is the appellee. The district court granted habeas relief on a claim of IAC at the punishment phase based on counsel's failure to call prison guards to testify about the petitioner's conduct in prison between the trial and the retrial on punishment. The petitioner, as the appellee, raised on appeal in support of the judgment a Confrontation Clause violation at the punishment stage. The warden/appellant argued that the court of appeals could not consider this claim because the petitioner did not obtain a COA. The court of appeals observed that 28 U.S.C. § 2253(c) "deals only with *appeals* by prisoners; it does not mention arguments by prisoners *as appellees* offered in support of relief they have obtained." *Id.* at 397. The petitioner/appellee "has not taken an appeal, nor did he need to do so," because "an appellee may defend his judgment on any ground properly preserved in the district court." *Id.* Because he did not ask for additional relief, "he was entitled to proceed exactly as he has done." *Id.* The court concluded that § 2253 "serves a gatekeeping function" and that, "once a case is properly before the court of appeals—for state and federal governments need not obtain certificates of appealability . . . —there are no remaining gates to be guarded." *Id.* at 398; *accord*, *Lancaster* v. *Adams*, 324 F.3d 423, 436 n.3 (6th Cir. 2003) (where district court granted habeas relief on unconstitutional use of peremptory challenges claim, court of appeals could consider merits of rejected post-arrest silence claim even though petitioner/appellee did not file cross-appeal or obtain COA). As *Szabo* observed, courts must "apply § 2253 as it is written," and, as written, § 2253 requires a COA only when the habeas petitioner seeks to take an appeal. 313 F.3d at 396.

Several circuits have held to the contrary that a habeas petitioner who is the appellee must obtain a COA to raise alternative arguments supporting the judgment. *Gratto* v. *Herbert*, 316 F.3d 198, 209 (2d Cir. 2003); *Manokey* v. *Waters*, 390 F.3d 767, 773-74 (4th Cir. 2004); *Wiley* v. *Epps*, 625 F.3d 199, 204 n.2 (5th Cir. 2010); *Lawhorn* v. *Allen*, 519 F.3d 1272, 1285 n.20 (11th Cir. 2008). These cases, however, offer little to no reasoning to support their holdings. They make no attempt to reconcile the holdings with the language of § 2253(c); nor could they, as the statute is plainly written as a restriction on when "an appeal may . . . be taken," 28 U.S.C. § 2253(c)(1), and "does not mention arguments by prisoners as appellees," *Szabo*, 313 F.3d at 397. A few cases offer the policy argument that requiring a habeas petitioner to obtain a COA will help "conserv[e] . . . judicial resources" and "focus[] the attention of litigants and the court on potentially meritorious issues, while avoiding the waste of judicial resources in a futile review of clearly meritless claims." *Grotto*, 316 F.3d at 209 (quoting *Roman* v. *Abrams*, 790 F.2d 244, 245 (2d Cir. 1986)); *see also, e.g.*, *Lawhorn* 519 F.3d at 1285 n.20 (The Antiterrorism and Effective Death Penalty Act is intended to reduce delay in state proceedings and "review of additional claims would, indeed, cause additional delay."). But such "policy justification[s]" deserve no weight where, as here, "the statutory text is plain and unambiguous." *Carcieri* v. *Salazar*, 555 U.S. 379, 387, 392 (2009).

Furthermore, policy arguments do not support a requirement that a habeas petitioner who is the appellee must obtain a COA to raise alternative grounds for affirmance. Before Congress enacted the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), appellate review of the dismissal of a

habeas petition was governed by a version of 28 U.S.C. § 2253 that was enacted in 1948. Act of June 25, 1948, ch. 646, 62 Stat. 967; *see Slack*, 529 U.S. at 480. Title 28 U.S.C. § 2253 "finds its origin in the Act of Congress of March 10, 1908 . . . ." *United States ex rel. Tillery* v. *Cavell*, 294 F.2d 12, 14 (3d Cir. 1961). Congress originally enacted this statute because it was "concerned with the abuse of the writ of habeas corpus in the federal courts resulting, it was said, in protracted appellant proceedings in frivolous cases and undue interference with state process." *Id.* It intended "to correct a very vicious practice of delaying the execution of criminals by groundless habeas corpus proceedings and appeals . . . ." *Id.* (quoting H.R. Rep. No. 60-23 (1908)). The "legislative history makes it clear that petitions to the federal courts filed by persons in state custody resulting in unnecessary delay in state proceedings was the evil that was sought to be remedied." *Id.* at 15; *see* H.R. Rep. No. 104-518 (1996) (Conf. Rep.). The current version of § 2253, enacted as part of the AEDPA, was intended to serve these same purposes, to "screen[] out issues unworthy of judicial time and attention and ensure[] that frivolous claims are not assigned to merits panels." *Gonzalez*, 132 S. Ct. at 650.

Requiring a habeas petitioner to obtain a COA to take an appeal clearly serves these purposes, but requiring a habeas petitioner who is the appellee to obtain a COA to present alternative arguments in support of the judgment does not. A habeas petitioner who is the appellee has prevailed on at least one claim in the district court, a strong indication that his petition was not "frivolous" or an "abuse of the writ" filed to obtain groundless delays. *Tillery*, 294 F.2d at 14. Further, this Court explained in *Gonzalez* that "[o]nce a judge has made the determination that a

COA is warranted and resources are deployed in briefing and argument . . . the COA has fulfilled [its] gatekeeping function," even if the COA fails to specify particular issues for appeal as § 2253(c)(3) requires. 132 S. Ct. at 650. *Gonzalez*'s reasoning applies equally when a district court has ruled in the habeas petitioner's favor and the government appeals; as *Szabo* observed, "once a case is properly before the court of appeals" because of the government's appeal, the COA's gate-keeping function has been fulfilled because "there are no remaining gates to be guarded." 313 F.3d at 398. Requiring the habeas petitioner to obtain a COA to raise alternate arguments as the appellee would not materially reduce delay or conserve judicial resources because the court of appeals still would need to decide the case on the merits. Even if requiring a COA "could further winnow" the arguments that a habeas petitioner could raise, "that would not outweigh the costs of further delay from the extra layer of review" of the COA proceedings. *Gonzalez*, 132 S. Ct. at 650.

C. Petitioner Did Not Have To Obtain A Certificate Of Appealability Pursuant To Federal Rule Of Appellate Procedure 22(b) Or Habeas Corpus Rule 11(a).

Neither Federal Rule of Appellate Procedure 22(b) nor Habeas Corpus Rule 11(a) requires petitioner to obtain a COA. This Court promulgated the Federal Rules Of Appellate Procedure in 1967, and they became effective in 1968. 43 F.R.D. 61, 67, 113. Federal Rule of Appellate Procedure 22(b)(1) provides, in pertinent part, "In a habeas corpus proceeding in which the detention complained of arises from process issued by a state court, or in a 28 U.S.C. § 2255 proceeding, the applicant cannot take an appeal unless a circuit justice or a circuit or district judge is-

sues a certificate of appealability under 28 U.S.C. § 2253(c) . . . If the district judge has denied the certificate, the applicant may request a circuit judge to issue it." Addendum 6a (Fed. R. App. P. 22(b)). The Advisory Committee Notes to the 1967 Adoption of the Federal Rules of Appellate Procedure observe that the legislative history strongly suggests that Congress intended to require a certificate only where "an appeal is taken by an applicant for the writ" and not by "a state or its representative." 43 F.R.D. at 141.

Rule 22(b)(2) also provides that, if no express request for a COA is filed, "the notice of appeal constitutes a request addressed to the judges of the court of appeals." Addendum 6a. The court of appeals must treat the notice of appeal as an application for a COA under subsection (b)(2) where the petitioner is the appellant. *Slack*, 529 U.S. at 483.[4] Rule 22(b)(3), enacted in 1998, provides that a COA "is not required when a state or its representative or the United States or its representative appeals." Addendum 6a.

Rule 22(b) did not require petitioner to obtain a COA on the rejected allegation of deficient performance because he was not "the applicant" and did not "take an appeal." The policy underlying the COA requirement of "ensur[ing] that frivolous claims are not assigned to merits panels," *Gonzalez*, 132 S. Ct. at 650, was satisfied because the Fifth Circuit acquired jurisdiction over the case by virtue of the appeal filed

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[4] The Sixth Circuit has treated a petitioner/appellee's brief as a request for a COA and considered the merits of claims rejected by the district court in granting habeas relief. *Wright v. Lafler*, 247 F. App'x 761, 764 n.2 (6th Cir. 2007).

by respondent, who was not required to obtain a COA pursuant to subsection (b)(3).

Habeas Corpus Rule 11(a) likewise did not require petitioner to obtain a COA. This Court promulgated the Rules Governing Section 2254 Cases in the United States District Courts in 1976, and they became effective in 1977. Act of Sept. 28, 1976, Pub. L. No. 94-426, 90 Stat. 1334. Rule 11(a), which became effective in 2009, provides, in pertinent part, "[t]he district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant . . . If the court issues a certificate, the court must state the specific issue or issues that satisfy the showing required by 28 U.S.C. § 2253(c)(2). If the court denies a certificate, a party may not appeal the denial but may seek a certificate from the court of appeals under Federal Rule of Appellate Procedure 22." Addendum 7a (Rules Governing § 2254 Cases, Rule 11(a), 28 U.S.C. foll. § 2254).

Rule 11 plainly was intended to implement § 2253(c) and should be read in conformity with the statute. The Rule's statement that "the district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant" tracks the "indication requirement" of § 2253(c)(3), and similarly purports to "bind[] only the judge issuing the COA," not the habeas petitioner. *Gonzalez*, 132 S. Ct. at 650. As the Advisory Committee Notes to the 2009 Amendments observe, the Rule rests on the premise that, "[a]s provided in 28 U.S.C. § 2253(c), an applicant *may not appeal to the court of appeals* from a final order in a proceeding under § 2254 unless a judge issues a certificate of appealability (COA) . . . ." Rules Governing § 2254 Cases, Rule 11(a), 28 U.S.C. foll. § 2254, Advisory Comm. Notes, 2009 amends. sub.(a) (emphasis added). Accordingly, like Rule 22(b) and

§ 2253, Rule 11(a) did not require petitioner to obtain a COA on the rejected allegation of deficient performance because he was not "the applicant," he did not "appeal," and the district court did not enter "a final order adverse to" him.

II. A FEDERAL HABEAS PETITIONER WHO PREVAILED IN THE DISTRICT COURT ON AN INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM DOES NOT HAVE TO OBTAIN A CERTIFICATE OF APPEALABILITY TO RAISE AN ALLEGATION OF DEFICIENT PERFORMANCE THAT THE DISTRICT COURT REJECTED WHERE THE DISTRICT COURT DID NOT ENTER A FINAL ORDER ADVERSE TO HIM.

A. Petitioner Did Not Have To Obtain A Certificate of Appealability On The Rejected Allegation Of Deficient Performance Where He Received In The Judgment All The Relief That He Requested On His Ineffective Assistance Of Counsel Claim.

Even if a COA were required in some circumstances when a habeas petitioner is the appellee, such as when he seeks to raise a claim that is entirely distinct from the claim that he prevailed upon, no COA was necessary here. Petitioner did not raise a separate claim on appeal that would have provided greater relief, but merely made an additional argument in support of the single claim that he prevailed upon in the district court.

Petitioner requested a new sentencing hearing based on three allegations of deficient performance by counsel at the punishment stage. The district court

granted a new sentencing hearing based on two of those allegations, but rejected the third. Because the district court did not enter an order adverse to petitioner, he was not required to obtain a COA for the Fifth Circuit to have jurisdiction to consider the rejected allegation of deficient performance.

As discussed above, the circuit courts disagree on whether a federal habeas petitioner/appellee must obtain a COA where he prevailed in the district court on one claim but lost on a separate claim. However, an examination of these cases demonstrates that, regardless of whether a COA is required where there are two or more discrete claims, it is not required where the petitioner/appellee received in the judgment all the relief that he requested on one claim.

The circuit court cases holding that a COA is required when the habeas petitioner is the appellee are distinguishable from petitioner's case because, in those cases, the petitioner/appellee who prevailed in the district court, without obtaining a COA, raised in the court of appeals a separate claim that the district court had rejected. These cases hold that a "habeas petitioner to whom the writ has been granted on one or more grounds may not assert, in opposition to an appeal by the state, any ground that the district court has not adopted unless the petitioner obtains a certificate of appealability permitting him to argue that ground." *Grotto*, 316 F.3d at 209 (petitioner who prevailed in district court—on claim that he was denied due process because he was not allowed to reopen to present additional evidence after he rested his case—could not raise on appeal rejected claims of IAC and improper admission of evidence); *Manokey*, 390 F.3d at 773-74 (petitioner who prevailed in district court on double jeopardy claim could not raise on appeal rejected IAC claim); *Wiley*, 625 F.3d at 204 n.2 (peti-

tioner who prevailed in district court on claim that he was ineligible for death sentence because of mental retardation could not raise on appeal unspecified rejected claims); *Lawhorn*, 519 F.3d at 1285 n.20 (petitioner who prevailed in district court on claims that confession was improperly admitted and counsel was ineffective in waiving closing argument at punishment phase of capital murder trial could not raise on appeal unspecified rejected claims); *cf. Rios* v. *Garcia*, 390 F.3d 1082, 1086-88 (9th Cir. 2004) (petitioner who prevailed in district court on cruel and unusual punishment claim could not raise on appeal rejected claims of IAC and violation of right to jury trial where he filed cross-appeal but COA was denied).

Here, petitioner's rejected allegation of deficient performance was subsumed within the IAC claim that he prevailed upon in the district court. It was not a separate claim. Respondent asserted in opposing certiorari:

> [T]he district court's decree entitled Jennings to relief on two of the three independent *Strickland* claims. The district court decreed that the third claim did not entitle Jennings to relief and Jennings did not appeal this decision. Therefore, Jennings may only defend the determination of the district court on those two claims which the Director appealed. Nothing in this Court's precedent suggests that he may reurge a separate claim upon which the court decreed he was *not* entitled to relief to support the district court's decree that he was entitled to relief.

Br. Opp'n at 39-40. Respondent also asserted that "trial counsel's closing argument—the subject of the third claim—is not evidence, and has no bearing on the prejudice analysis of the other claims. Thus, it is

reviewed separately." Br. Opp'n at 40. Respondent demonstrates a fundamental misunderstanding of the nature of an IAC claim and this Court's precedent by categorizing allegations of deficient performance in support of an IAC claim as "separate claims." This Court has held that IAC is a single claim.

A defendant in a criminal case has a right to the effective assistance of counsel at trial. U.S. Const. amends. VI & XIV; *Powell* v. *Alabama*, 287 U.S. 45, 68-72 (1932). Counsel must act within the range of competence demanded of counsel in criminal cases. *McMann* v. *Richardson*, 397 U.S. 759, 771 (1970).

This Court addressed the federal constitutional standard to determine whether counsel rendered reasonably effective assistance in *Strickland*. To determine whether counsel rendered effective assistance, courts apply the "now-familiar test" set forth in *Strickland*: the defendant "must show (1) that counsel's representation 'fell below an objective standard of reasonableness,' ... and (2) that counsel's deficient performance prejudiced the defendant ...." *Roe* v. *Flores-Ortega*, 528 U.S. 470, 476-77 (2000) (citations omitted) (quoting *Strickland*, 466 U.S. at 688). Thus, *Strickland* established that IAC is one claim with two prongs.

The defendant first must show that counsel's performance was deficient—that counsel made errors so serious that he was not functioning as the "counsel" guaranteed by the Sixth Amendment. *Strickland*, 466 U.S. at 687. The defendant must identify specific acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment. *Id.* at 690. The reviewing court must then determine whether, in light of all the circumstances, the identified acts or omissions were outside the range of professionally competent assistance. *Id.* This is

commonly referred to as the "deficient performance prong" of an IAC claim. *Missouri* v. *Frye*, 132 S. Ct. 1399, 1410 (2012).

Second, the defendant must show that counsel's deficient performance prejudiced the defense—that counsel's errors were so serious as to deprive the defendant of a fair trial with a reliable result. *Strickland*, 466 U.S. at 687. The defendant "need not show that counsel's deficient conduct more likely than not altered the outcome in the case." *Id.* at 693. "The result of a proceeding can be rendered unreliable, and hence the proceeding itself unfair, even if the errors of counsel cannot be shown by a preponderance of the evidence to have determined the outcome." *Id.* at 694. Thus, the defendant need show only "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* This is commonly referred to as the "prejudice prong" of an IAC claim. *Padilla* v. *Kentucky*, 559 U.S. 356, 371 n.12 (2010).

The essence of an IAC claim is that "counsel's unprofessional errors so upset the adversarial balance between defense and prosecution that the trial was rendered unfair and the verdict rendered suspect." *Kimmelman* v. *Morrison*, 477 U.S. 365, 374 (1986). When determining prejudice, the question is not whether the defendant more likely than not would have received a different verdict but for counsel's errors but whether, in light of the errors, he received a trial resulting in a verdict worthy of confidence. *Cf. Kyles* v. *Whitley*, 514 U.S. 419, 434 (1995).

Strickland requires a court reviewing an IAC claim to consider the cumulative effect of each act or omission that constitutes deficient performance in light of

the totality of the evidence and determine whether there is a reasonable probability that, but for these errors, the outcome of the proceeding would have been different. This Court has repeatedly referred to counsel's errors in the plural in discussing how to determine prejudice:

- "Even if a defendant shows that particular *errors* of counsel were unreasonable, therefore, the defendant must show that *they* actually had an adverse effect on the defense." *Strickland*, 466 U.S. at 693 (emphasis added);
- "The result of a proceeding can be rendered unreliable, and hence the proceeding itself unfair, even if the *errors* of counsel cannot be shown by a preponderance of the evidence to have determined the outcome." *Id.* at 694 (emphasis added);
- The defendant must show "a reasonable probability that, but for counsel's unprofessional *errors*, the result of the proceeding would have been different." *Id.* (emphasis added);
- "In making the determination whether the specified *errors* resulted in the required prejudice . . . ." *Id.* (emphasis added);
- "In making this determination, a court hearing an ineffectiveness claim must consider the *totality of the evidence* before the judge or jury." *Id.* at 695 (emphasis added); and
- "[A] court making the prejudice inquiry must ask if the defendant has met the burden of showing that the decision reached

> would reasonably likely have been different absent the *errors*." *Id.* at 696 (emphasis added).

Importantly, *Strickland* clearly established that the prejudice analysis for an IAC claim is the same as the materiality analysis for a suppression of evidence claim under *United States* v. *Agurs*, 427 U.S. 97, 104, 112-13 (1976); *Strickland*, 466 U.S. at 694 ("[T]he appropriate test for prejudice finds its roots in the test for materiality of exculpatory information not disclosed to the defense by the prosecution . . . .").

Kyles reiterated this proposition when it recognized that the materiality analysis announced in *United States* v. *Bagley*, 473 U.S. 667 (1985), was the same as the prejudice analysis announced in *Strickland*. *Kyles*, 514 U.S. at 434. *Bagley* requires that suppressed evidence be "considered collectively, not item by item." *Kyles*, 514 U.S. at 436. "We evaluate the tendency and force of the undisclosed evidence item by item; there is no other way. We evaluate its *cumulative effect* for purposes of materiality separately and at the end of the discussion . . . ." *Id.* at 436 n.10 (emphasis added). *Kyles* held that the Fifth Circuit erred in its materiality analysis by considering each item of suppressed evidence individually rather than collectively. *Id.* at 441 ("The result reached by the Fifth Circuit majority is compatible with a series of independent materiality evaluations, rather than the *cumulative* evaluation required by *Bagley* . . . ." (emphasis added)).

Because the materiality analysis for a suppression of evidence claim is the same as the prejudice analysis for an IAC claim, a court reviewing an IAC claim must consider the cumulative effect of counsel's errors on the outcome of the trial. Accordingly, courts that have considered the issue have acknowledged,

explicitly or implicitly, that IAC is a single claim in which the court determines prejudice based on the cumulative effect of counsel's deficiencies in performance.[4] *See Rodriguez* v. *Hoke*, 928 F.2d 534, 538 (2d Cir. 1991); *Berryman* v. *Morton*, 100 F.3d 1089, 1101-02 (3d Cir. 1996); *Stouffer* v. *Reynolds*, 168 F.3d 1155, 1163-64 (10th Cir. 1999); *Moore* v. *Johnson*, 194 F.3d 586, 619 (5th Cir. 1999), *superseded on other grounds by statute*, AEDPA, Pub. L. No. 104-132, 110 Stat. 1214.

A state court unreasonably applies the *Strickland* prejudice analysis under the AEDPA in considering each error in isolation instead of cumulatively. *Goodman* v. *Bertrand*, 467 F.3d 1022, 1030 (7th Cir. 2006). The Eleventh Circuit has considered aspects of an IAC claim on which the petitioner/appellant did not obtain a COA, including counsel's ineffectiveness during his punishment phase closing argument, "because it is plainly an integral part of [petitioner's] claim that trial counsel was ineffective at the penalty phase." *Ferrell* v. *Hall*, 640 F.3d 1199, 1223 n.15 (11th Cir. 2011).

Petitioner asserted a single claim of IAC. The Fifth Circuit erred when it treated the affirmatively prejudicial closing argument as a separate claim instead of another deficiency in performance that established IAC. Thus, petitioner did not have to obtain a COA on the rejected allegation of deficient performance on his IAC claim where he received in the judgment all the relief that he requested.

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[4] IAC at the guilt-innocence stage and IAC at the punishment stage are separate claims because each, if sustained, requires different relief.

B. The Fifth Circuit Had Jurisdiction To Issue A Certificate Of Appealability, If Necessary, Even Though Petitioner Did Not Request One From The District Court.

Finally, even if petitioner were required to obtain a COA, the Fifth Circuit erred in holding that it lacked jurisdiction to issue one. Two days after respondent filed his reply brief arguing that the Fifth Circuit lacked jurisdiction to consider the cross-point because petitioner did not obtain a COA, petitioner filed a motion for a COA in the Fifth Circuit in an abundance of caution and without conceding that it was required. The Fifth Circuit dismissed the cross-point and held that it lacked jurisdiction to grant a COA because petitioner "failed to seek a COA from the district court first" (J.A. 66). It cited *Cardenas* v. *Thaler*, 651 F.3d 442, 443 (5th Cir. 2011), for the proposition that the "district court must first rule on a petitioner's COA request before this court has jurisdiction to consider it" (J.A. 66). The Fifth Circuit's decision is not supported by statute, rule, or case law. Moreover, it did not even follow the procedure that it established in *Cardenas*.

Petitioner did not have to seek a COA from the district court because he received in the judgment all the relief that he requested, and the final order was not "adverse" to him. *See* Rules Governing § 2254 Cases, Rule 11(a), 28 U.S.C. foll. § 2254. The Sixth Circuit has treated a prevailing habeas petitioner/appellee's brief as a request for a COA and considered the claims rejected by the district court. *Wright*, 247 F. App'x at 704 n.2.

Furthermore, the validity of *Cardenas* may be in question after *Gonzalez* v. *Thaler*, 132 S. Ct. at 648. *Gonzalez* held that the requirement that a habeas pe-

titioner who is the appellant obtain a COA is jurisdictional, but that "defects" in the COA process, such as a failure to make the required specification of issues on which there is a substantial showing of the denial of a constitutional right, are non-jurisdictional. *Id.* Unlike the appellant's failure to file a timely notice of appeal, the appellee's failure to file a necessary cross-appeal is not a jurisdictional defect. *See, e.g.*, *Greenlaw* v. *United States*, 554 U.S. 237, 245 (2008) (recognising a circuit split on this issue and reserving it for future case); *id.* at 256-57, 259 (Alito, J., dissenting) (observing that cross-appeal requirement is "a rule of appellate practice" and that court of appeals has jurisdiction to consider appellee's arguments despite absence of cross-appeal); Wright & Miller, *supra*, § 3904 ("It is better to recognise power to modify a judgment in favor of a nonappealing party. All of the rather uncertain advantages to be gained from the cross-appeal requirement can be enjoyed by treating it as a rule of practice, to be enforced unless there is good reason for dispensation."). Therefore, if the appellee must obtain a COA, his failure to seek one in the district court before seeking it in the court of appeals is a non-jurisdictional "defect" in the COA process, like the failure to specify issues in *Gonzalez*, and does not preclude consideration of his argument. *Gonzalez*, 132 S. Ct. at 648.

Assuming *arguendo* that *Cardenas* remains valid, the Fifth Circuit should have remanded petitioner's case to the district court for the limited purpose of considering whether to issue a COA, as it did in *Cardenas*. 651 F.3d at 447.[6] It disregarded its own prec-

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[6] Had the district court believed that petitioner needed a COA to appeal the rejected allegation of deficient performance, it would have issued or denied a COA *sua sponte* pursuant to Rule 11(a).

edent by dismissing the cross-point instead of remanding the case to the district court. Thus, this Court should, at the very least, vacate the Fifth Circuit's judgment and instruct the Fifth Circuit to remand to the district court to grant or deny a COA. *See* 28 U.S.C. § 2106.

To summarize, the COA requirements of 28 U.S.C. § 2253(c)(1), Federal Rule of Appellate Procedure 22(b), and Habeas Corpus Rule 11(a) do not apply to a petitioner/appellee where he did not take the appeal and the district court did not enter a final order adverse to him. Assuming *arguendo* that a petitioner who prevailed in the district court must obtain a COA to raise on appeal a separate claim that the district court rejected (no matter whether a favorable decision would expand the relief granted by the judgment), he need not do so to raise a rejected allegation of deficient performance on a single IAC claim where he received in the judgment all the relief that he requested. However, if petitioner needed to obtain a COA in this case, the Fifth Circuit erred in holding that he needed to seek it first from the district court or, alternatively, in failing to remand the case to the district court to rule on a COA.

CONCLUSION

This Court should reverse the judgment and remand to the Fifth Circuit for further consideration of the IAC claim.

Respectfully submitted.

JEFFREY T. GREEN
ERIKA L. MYERS
JEFFREY S. BEELAERT
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000
jgreen@sidley.com

RANDOLPH L. SCHAFFER, JR.
Counsel of Record
1301 McKinney, Sta. 3100
Houston, Texas 77010
(713) 951-9555
nogult@swbell.net

Counsel for Petitioner

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CONSTITUTION OF THE UNITED STATES OF AMERICA

AMENDMENT VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

CONSTITUTION OF THE UNITED STATES OF AMERICA

AMENDMENT XIV

Section 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

TITLE 28
JUDICIARY AND JUDICIAL PROCEDURE
PART VI—PARTICULAR PROCEEDINGS
CHAPTER 153—HABEAS CORPUS

§ 2253. Appeal

* * *

(c)(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from—

(A) The final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or

(B) the final order in a proceeding under section 2255.

(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

(3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

FEDERAL RULES OF APPELLATE PROCEDURE

TITLE II. APPEAL FROM A JUDGMENT OR ORDER OF A DISTRICT COURT

Rule 3. Appeal as of Right—How Taken

(a) **Filing the Notice of Appeal.**

(1) An appeal permitted by law as of right from a district court to a court of appeals may be taken only by filing a notice of appeal with the district clerk within the time allowed by Rule 4. At the time of filing, the appellant must furnish the clerk with enough copies of the notice to enable the clerk to comply with Rule 3(d).

FEDERAL RULES OF APPELLATE PROCEDURE

TITLE II. APPEAL FROM A JUDGMENT OR ORDER OF A DISTRICT COURT

Rule 4. Appeal as of Right—When Taken

(a) **Appeal in a Civil Case.**

(3) **Multiple Appeals.** If one party timely files a notice of appeal, any other party may file a notice of appeal within 14 days after the date when the first notice was filed, or within the time otherwise prescribed by this Rule 4(a), whichever period ends later.

FEDERAL RULES OF APPELLATE PROCEDURE

TITLE VI. HABEAS CORPUS; PROCEEDINGS IN FORMA PAUPERIS

Rule 22. Habeas Corpus and Section 2255 Proceedings

(b) **Certificate of Appealability.**

(1) In a habeas corpus proceeding in which the detention complained of arises from process issued by a state court, or in a 28 U.S.C. § 2255 proceeding, the applicant cannot take an appeal unless a circuit justice or a circuit or district judge issues a certificate of appealability under 28 U.S.C. § 2253(c). If an applicant files a notice of appeal, the district clerk must send to the court of appeals the certificate (if any) and the statement described in Rule 11(a) of the Rules Governing Proceedings Under 28 U.S.C. § 2254 or § 2255 (if any), along with the notice of appeal and the file of the district-court proceedings. If the district judge has denied the certificate, the applicant may request a circuit judge to issue it.

(2) A request addressed to the court of appeals may be considered by a circuit judge or judges, as the court prescribes. If no express request for a certificate is filed, the notice of appeal constitutes a request addressed to the judges of the court of appeals.

(3) A certificate of appealability is not required when a state or its representative or the United States or its representative appeals.

RULES GOVERNING SECTION 2254 CASES IN THE UNITED STATES DISTRICT COURTS

Rule 11. Certificate of Appealability; Time to Appeal

(a) **Certificate of Appealability.** The district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant. Before entering the final order, the court may direct the parties to submit arguments on whether a certificate should issue. If the court issues a certificate, the court must state the specific issue or issues that satisfy the showing required by 28 U.S.C. § 2253(c)(2). If the court denied a certificate, a party may not appeal the denial but may seek a certificate from the court of appeals under Federal Rule of Appellate Procedure 22. A motion to reconsider a denial does not extend the time to appeal.

RESPONDENT'S BRIEF

No. 13-7211

In the Supreme Court of the United States

ROBERT MITCHELL JENNINGS, PETITIONER

v.

WILLIAM STEPHENS, DIRECTOR,
TEXAS DEPARTMENT OF CRIMINAL JUSTICE,
CORRECTIONAL INSTITUTIONS DIVISION

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT

GREG ABBOTT
Attorney General of Texas

DANIEL T. HODGE
First Assistant
Attorney General

JONATHAN F. MITCHELL
Solicitor General

ANDREW S. OLDHAM
Deputy Solicitor General
Counsel of Record

ARTHUR C. D'ANDREA
ALEX POTAPOV
Assistant Solicitors General

OFFICE OF THE
ATTORNEY GENERAL
P.O. Box 12548 (MC 059)
Austin, Texas 78711-2548
andrew.oldham@
texasattorneygeneral.gov
(512) 936-1700

QUESTION PRESENTED

Whether a prisoner is excused from cross-appealing and securing a certificate of appealability on a claim he lost because he won another.

TABLE OF CONTENTS

Page

Introduction 1

Statement 2

Summary of Argument 5

Argument 7

I. Petitioner needed to cross-appeal 7

A. Petitioner was required to cross-appeal because he sought additional relief 7

1. Petitioner sought to enlarge his rights 8

2. Petitioner must cross-appeal to enlarge his rights 18

B. Petitioner was required to cross-appeal a claim he lost below 23

1. Petitioner must cross-appeal to change the disposition of a claim 23

2. Petitioner tried to change the disposition of his *Spisak* claim 31

II. Petitioner needed a certificate of appealability 40

A. The COA requirement applies in government-on-top appeals 40

B. Petitioner needed a COA on his *Spisak* claim 47

Conclusion 50

Appendix

Relevant constitutional and statutory provisions 1a

Judgment in a Civil Case, *Moore* v. *Keller*,
No. 5:11-HC-2148-F
(W.D.N.C. Mar. 30, 2012) 17a
Order, *Lam* v. *Kelchner*, No. 98-3109
(E.D. Pa. Oct. 20, 2000) 18a

TABLE OF AUTHORITIES

Cases:

Agripost, Inc. v. *Miami-Dade County*,
195 F.3d 1225 (11th Cir. 1999) 17

Alexander v. *Cosden Pipe Line Co.*,
290 U.S. 484 (1934) 5, 24, 26, 27

Altizer v. *Deeds*,
191 F.3d 540 (4th Cir. 1999) 30

Arizona v. *Fulminante*,
499 U.S. 279 (1991) 9

Arlinghaus v. *Ritenour*,
622 F.2d 629 (2d Cir. 1980) 27, 28, 29

Art Midwest Inc. v. *Atlantic Ltd. P'ship XII*,
742 F.3d 206 (5th Cir. 2014) 17, 30

Ball v. *Rodgers*,
492 F.3d 1094 (9th Cir. 2007) 19

Barefoot v. *Estelle*,
463 U.S. 880 (1983) 43

Berkemer v. *McCarty*,
468 U.S. 420 (1984) 20, 21

Black v. *Cutter Labs.*,
351 U.S. 292 (1956) 14

Blum v. *Bacon*,
457 U.S. 132 (1982) 30

Bowen v. *Postal Serv.*,
459 U.S. 212 (1983) 30

Brewer v. *Williams*,
430 U.S. 387 (1977) 12, 13

Broadcast Music, Inc. v. *Columbia Broad. Sys., Inc.*, 441 U.S. 1 (1979) 30

Brown v. *Allen*,
344 U.S. 443 (1953) 43

Bryson v. *United States*,
268 F.3d 560 (8th Cir. 2001) 42

Bullard v. *Sercon Corp.*,
846 F.2d 463 (7th Cir. 1988) 29

Bush v. *United States*,
765 F.2d 683 (7th Cir. 1985) 37

Cabana v. *Bullock*,
474 U.S. 376 (1986) 12

Chioino v. *Kernan*,
581 F.3d 1182 (9th Cir. 2009) 9

Cooper v. *Federal Reserve Bank*,
467 U.S. 867 (1984) 24

Coulter v. *Gilmore*,
155 F.3d 912 (7th Cir. 1998) 11

County of Los Angeles v. *Davis*,
440 U.S. 625 (1979) 22

Crowley Caribbean Transp., Inc. v. *Pena*,
37 F.3d 671 (D.C. Cir. 1994) 10

Cullen v. *Pinholster*,
131 S. Ct. 1388 (2011) 35, 36, 39

Custer v. *Sweeney*,
89 F.3d 1156 (4th Cir. 1996) 16, 17

Day v. *McDonough*,
547 U.S. 198 (2006) 32

Doll v. *Brown*,
75 F.3d 1200 (7th Cir. 1996) 29

Drax v. *Reno*,
338 F.3d 98 (2d Cir. 2003) 21

EEOC v. *Shell Oil Co.*,
466 U.S. 54 (1984) 17, 18

Edwards v. *Carpenter*,
529 U.S. 446 (2000) 39

Electrical Fittings Corp. v. *Thomas & Betts Co.*,
307 U.S. 241 (1939) 17

El Paso Natural Gas Co. v. *Neztsosie*,
526 U.S. 473 (1999) 19, 21, 30

Evitts v. *Lucey*,
469 U.S. 387 (1985) 44

Federal Energy Admin. v. *Algonquin SNG, Inc.*,
426 U.S. 548 (1976) 22

Fisher v. *Angelone*,
163 F.3d 835 (4th Cir. 1998) 37

Forrest v. *Florida Dep't of Corr.*,
342 F. App'x 560 (11th Cir. Aug. 21, 2009) 38

French v. *Estelle*,
692 F.2d 1021 (5th Cir. 1982) 22, 23

Fretwell v. *Norris*,
133 F.3d 621 (8th Cir. 1998) 41

Frey v. *Fulcomer*,
132 F.3d 916 (3d Cir. 1997) 11

Gallow v. *Cooper*,
133 S. Ct. 2730 (2013) 38

Garcia v. *Portuondo*,
459 F. Supp. 2d 267 (S.D.N.Y. 2006) 11

Gardner v. *Johnson*,
247 F.3d 551 (5th Cir. 2001) 11

Gentry v. *Deuth*,
456 F.3d 687 (6th Cir. 2006) 9

Gonzalez v. *Crosby*,
545 U.S. 524 (2005) 28, 32

Gonzalez v. *Thaler*,
132 S. Ct. 641 (2012) 41, 42, 48, 49

Greenlaw v. *United States*,
554 U.S. 237 (2008) 30

Grotto v. *Herbert*,
316 F.3d 198 (2d Cir. 2003) 41, 46, 47
Haitian Refugee Ctr., Inc. v. *Baker*,
949 F.2d 1109 (11th Cir. 1991) 19, 30
Harrington v. *Richter*,
131 S. Ct. 770 (2011) 39, 44, 45
Helmig v. *Kemna*,
461 F.3d 960 (8th Cir. 2006) 16
Helvering v. *Gowran*,
302 U.S. 238 (1937) 25
Helvering v. *Pfeiffer*,
302 U.S. 247 (1937) 5, 24, 25, 26, 30
Herrera v. *Collins*,
506 U.S. 390 (1993) 8, 11
High Tech Med. Instr., Inc. v. *New Image Indus.*,
49 F.3d 1551 (Fed. Cir. 1995) 19, 30
Hilton v. *Braunskill*,
481 U.S. 770 (1987) 8, 9, 20
House v. *Bell*,
547 U.S. 518 (2006) 32
In re Indian Motocycle Co.,
452 F.3d 25 (1st Cir. 2006) 17
In re Reno,
283 P.3d 1181 (Cal. 2012) 43
Jackson v. *Herring*,
42 F.3d 1350 (11th Cir. 1995) 16
Jennings v. *Stephens*,
134 S. Ct. 1539 (2014) 4, 43
Johnson v. *Mississippi*,
486 U.S. 578 (1988) 10
Jones v. *Stotts*,
59 F.3d 143 (10th Cir. 1995) 36

Kelley v. *Secretary for Dep't of Corr.*,
377 F.3d 1317 (11th Cir. 2004) 16

Kyles v. *Whitley*,
514 U.S. 419 (1995) 35

Lafler v. *Cooper*,
132 S. Ct. 1376 (2012) 12

Lam v. *Kelchner*,
304 F.3d 256 (3d Cir. 2002) 15

Lancaster v. *Adams*,
324 F.3d 423 (6th Cir. 2003) 42

Lawhorn v. *Allen*,
519 F.3d 1272 (2008) 16, 30, 41

Lazare Kaplan Int'l, Inc. v. *Photoscribe Techs., Inc.*, 561 U.S. 320 (2010) 17

Local P-171, Amalgamated Meat Cutters v. *Thompson Farms Co.*,
642 F.2d 1065 (7th Cir. 1981) 37

Magwood v. *Culliver*,
555 F.3d 968 (11th Cir. 2009) 16

Magwood v. *Patterson*,
561 U.S. 320 (2010) 16

Manokey v. *Waters*,
390 F.3d 767 (4th Cir. 2004) 41

Martel v. *Clair*,
132 S. Ct. 1276 (2012) 34

Martinez v. *Ryan*,
132 S. Ct. 1309 (2012) 39

Maryland Cas. Co. v. *State Bank & Trust Co.*,
425 F.2d 979 (5th Cir. 1970) 21, 22

Mathis v. *Zant*,
903 F.2d 1368 (11th Cir. 1990) 37

Matthews v. *Abramajtys*,
319 F.3d 780 (6th Cir. 2003) 11, 13, 14
Mayfield v. *Woodford*,
270 F.3d 915 (9th Cir. 2001) 11
McCarty v. *Herdman*,
716 F.2d 361 (6th Cir. 1983) 20
McQuiggin v. *Perkins*,
133 S. Ct. 1924 (2013) 48
Memphis Light, Gas & Water Div. v. *Craft*,
436 U.S. 1 (1978) 10
Middleton v. *Roper*,
455 F.3d 838 (8th Cir. 2006) 36
Miller-El v. *Cockrell*,
537 U.S. 322 (2003) 45, 46, 47
Moore v. *Hardee*,
723 F.3d 488 (4th Cir. 2013) 15, 16
Morley Constr. Co. v. *Maryland Cas. Co.*,
300 U.S. 185 (1937) 18, 19, 21
Munaf v. *Geren*,
553 U.S. 674 (2008) 19, 20
Northwest Airlines, Inc. v. *County of Kent*,
510 U.S. 355 (1994) 21, 31
Ochoa v. *United States*,
2014 WL 2853736 (11th Cir. June 24, 2014)....36
Parker v. *Dugger*,
498 U.S. 308 (1991) 12
Parle v. *Runnels*,
387 F.3d 1030 (9th Cir. 2004) 16
Peoples v. *United States*,
403 F.3d 844 (7th Cir. 2005) 37
Peterson v. *Douma*,
751 F.3d 524 (7th Cir. 2014) 6, 48

Phifer v. *Warden*,
53 F.3d 859 (7th Cir. 1995) 14

Plaut v. *Spendthrift Farm, Inc.*,
514 U.S. 211 (1995) 24

Powell v. *Berghuis*,
2013 WL 6620475 (6th Cir. Dec. 17, 2013) 37

Radio Sys. Corp. v. *Lalor*,
709 F.3d 1124 (Fed. Cir. 2013) 17

Rhines v. *Weber*,
544 U.S. 269 (2005) 34

Richmond v. *Lewis*,
506 U.S. 40 (1992) 9, 12

Rios v. *Garcia*,
390 F.3d 1082 (9th Cir. 2004) 41

Roe v. *Delo*,
160 F.3d 416 (8th Cir. 1998) 11

Roman v. *Abrams*,
790 F.2d 244 (2d Cir. 1986) 40, 41, 47

Rompilla v. *Beard*,
545 U.S. 374 (2005) 12

Ryan v. *Gonzales*,
133 S. Ct. 696 (2013) 32

Schlup v. *Delo*,
513 U.S. 298 (1995) 20

Sea-Land Serv., Inc. v. *DOT*,
137 F.3d 640 (D.C. Cir. 1998) 10

Segura v. *Jones*,
259 F. App'x 95 (10th Cir. 2007) 30

Slack v. *McDaniel*,
529 U.S. 473 (2000) 41, 48

Smith v. *Cockrell*,
311 F.3d 661 (5th Cir. 2002) 16

Smith v. *Lucas*,
9 F.3d 359 (5th Cir. 1993) 9, 12, 13

Smith v. *Spisak*,
558 U.S. 139 (2010) 3, 44

Steffel v. *Thompson*,
415 U.S. 452 (1974) 10

Strickland v. *Washington*,
466 U.S. 668 (1984) 9, 31, 32, 33, 35

Szabo v. *Walls*,
313 F.3d 393 (7th Cir. 2002) 41, 42, 43

Taylor v. *Maddox*,
366 F.3d 992 (9th Cir. 2004) 11

Tennard v. *Dretke*,
542 U.S. 274 (2004) 16

Tolson v. *United States*,
732 F.2d 998 (D.C. Cir. 1984) 37

Trevino v. *Thaler*,
133 S. Ct. 1911 (2013) 33, 39

Trueblood v. *Davis*,
301 F.3d 784 (7th Cir. 2002) 29

United States v. *American Ry. Express Co.*,
265 U.S. 425 (1924). 5, 18, 22, 24

United States v. *Blackfeather*,
155 U.S. 180 (1894). 27

United States v. *Bohn*,
959 F.2d 389 (2d Cir. 1992). 29

United States v. *Ewing*,
140 U.S. 142 (1891). 27

United States v. *Galloway*,
56 F.3d 1239 (10th Cir. 1995) 37

United States v. *Hickey*,
84 U.S. 9 (1872). 27

United States v. *Hilger*,
867 F.2d 566 (9th Cir. 1989) 18

United States v. *Nobles*,
422 U.S. 225 (1975). 27

United States v. *Reliable Transfer Co.*,
421 U.S. 397 (1975). 27

United States v. *Thomas*,
724 F.3d 632 (5th Cir. 2013). 36

University of Texas Sw. Med. Ctr. v. *Nassar*,
133 S. Ct. 2517 (2013). 45

Utility Air Regulatory Group v. *EPA*,
134 S. Ct. 2427 (2014). 46

Vicaretti v. *Henderson*,
645 F.2d 100 (2d Cir. 1980). 40, 46

Wainwright v. *Lockhart*,
80 F.3d 1226 (8th Cir. 1996). 36

Walker v. *Deeds*,
50 F.3d 670 (9th Cir. 1995) 11

Walker v. *Martin*,
131 S. Ct. 1120 (2011) 34

Wiggins v. *Smith*,
539 U.S. 510 (2003) 3, 32, 33

White v. *Sowders*,
644 F.2d 1177 (6th Cir. 1980) 8

Wiley v. *Epps*,
625 F.3d 199 (5th Cir. 2010) 16, 41

Wilkinson v. *Dotson*,
544 U.S. 74 (2005) 8

Wolfe v. *Clarke*,
718 F.3d 277 (4th Cir. 2013) 12, 14

Yick Man Mui v. *United States*,
614 F.3d 50 (2d Cir. 2010) 37

Constitution, statutes, and rules:

18 U.S.C. 3599 34
28 U.S.C. 2253 ..... 40, 41, 42, 46, 47, 48
28 U.S.C. 2253(c) 47
28 U.S.C. 2253(c)(1) 46
28 U.S.C. 2253(c)(1)(A) 45
28 U.S.C. 2253(c)(3) 6, 41, 46
28 U.S.C. 2254(b) 38
28 U.S.C. 2254(d) 4, 38, 39
Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat 1214 45
Fed. R. App. P. 22 45
Fed. R. App. P. 22(b) 45
Fed. R. Civ. P. 54(b) 37

Miscellaneous:

American Bar Association Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases, reprinted in 31 Hofstra L. Rev. 913 (2003) 43
Brief of Appellant, *Jennings* v. *Thaler*, No. 12-70018 (5th Cir. Aug. 31, 2012) 44
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ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
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BRIEF FOR THE RESPONDENT

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant constitutional and statutory provisions are reprinted in an appendix to this brief. App., *infra*, 1a-16a.

INTRODUCTION

Petitioner misunderstands federal-court judgments, and hence the cross-appeal rule, in two respects.

First, a conditional writ of habeas corpus is more than just an order to release or retry the prisoner: it is an order to release or retry the prisoner without repeating the constitutional errors identified by the federal court. Petitioner prevailed in the district court on only two of his three constitutional claims, so he won a judgment ordering the State to cure only two constitutional errors. In other words, petitioner did *not* win "all the relief he requested." Pet'r Br. 5. He was free to ask the

court of appeals to expand his relief by ordering the State to avoid the third error as well. But a request for additional relief requires a cross-appeal.

Second, a judgment is more than the relief it provides; it also incorporates every claim it resolves. So any decision that changes the disposition of a claim also alters the underlying judgment, even if the relief remains the same. Here, petitioner lost one of his three claims in the district court, so he needed a cross-appeal to advance that rejected claim in the court of appeals.

Finally, petitioner needed a certificate of appealability ("COA"). The COA requirement remains in force where a prisoner opposes the government's appeal. Petitioner's contrary argument has been overwhelmingly rejected by the courts of appeals; it rests on a misreading of the statute; and it would undermine the goals of the COA requirement.

STATEMENT

A. On July 19, 1988, petitioner shot Houston Police Officer Elston Howard four times in the head. Petitioner twice confessed to the murder, once in writing and once in a lengthy, tape-recorded interview with police. It took the jury just over an hour to find petitioner guilty of capital murder.

At sentencing, defense counsel could not portray petitioner as mentally disabled because his IQ is 105. SHCR341; JA56; contra Pet'r Br. 3 (claiming petitioner suffers from "mild mental retardation"). Counsel chose instead to portray their client as remorseful. They called a prison chaplain who counseled petitioner two to three days a week. The chaplain testified that petitioner was an asset to the chaplain's ministry, that petitioner served other inmates, and that petitioner was not "incorrigible." JA43. And one of petitioner's lawyers closed by urging

the jury to consider "all of those facts" and not to vote rashly for the death penalty. 39RR239. Counsel said that, if the jury studied the facts carefully and voted for death, "I can't quarrel with that." *Ibid.* "But if you can, I ask you to find * * * mitigation" and vote for life. 39RR240.

The jury found no mitigation, and the court sentenced petitioner to death. The Texas Court of Criminal Appeals affirmed his conviction and sentence on direct appeal.

B. After exhausting his state remedies, petitioner filed a federal habeas application on January 27, 2009. USCA5.4-46. He raised three sentencing-phase claims of ineffective assistance of counsel. Those claims were conceptually distinct and turned on three separate allegations of trial-counsel error: (1) counsel's decision not to call family members to testify at the sentencing hearing; (2) counsel's failure to discover a psychologist's report; and (3) counsel's statements during closing argument at the sentencing hearing. The first and second of those alleged errors implicate *Wiggins* v. *Smith*, 539 U.S. 510 (2003), and hence can be called "*Wiggins* claims." See *id.* at 525 (lawyer's failure to investigate family background and evidence of mental problems can constitute ineffective assistance of counsel). The third of those alleged errors implicates *Smith* v. *Spisak*, 558 U.S. 139 (2010), and hence can be called a "*Spisak* claim." See *id.* at 151 (lawyer's statements during closing argument can constitute ineffective assistance of counsel).

The district court granted petitioner's *Wiggins* claims and denied his *Spisak* claim. As to the first *Wiggins* claim, the court held that counsel's decisions not to call petitioner, his mother, or his sister summed to an unreasonable and prejudicial strategic judgment, even if they "might make sense in isolation." USCA5.115. As to

the second *Wiggins* claim, the district court held that trial counsel unreasonably and prejudicially failed to find a 1978 psychological report. USCA5.117. But as to the *Spisak* claim, the district court held that counsel performed reasonably: "It is clear from the record that counsel was trying to identify with the jurors, and to convince them that he was a reasonable man who shared their interest in a safe community." USCA5.117.

The Director filed a timely notice of appeal as to the *Wiggins* claims, USCA5.123-25, but petitioner did not cross-appeal as to the *Spisak* claim. Petitioner also did not seek a COA from the district court, though he eventually requested one from the court of appeals. The Fifth Circuit reversed on both *Wiggins* claims and held that neither could overcome the Antiterrorism and Effective Death Penalty Act's ("AEDPA") relitigation bar, 28 U.S.C. 2254(d). JA49-60. The court of appeals further held that it lacked jurisdiction over the *Spisak* claim because petitioner failed to cross-appeal or obtain a COA. JA68. Finally, the panel denied petitioner's request for a COA on the merits. See *ibid.*

This Court granted certiorari, limited to the question whether petitioner needed to cross-appeal and secure a COA. 134 S. Ct. 1539 (2014) (mem.).

SUMMARY OF ARGUMENT

I. Petitioner was required to cross-appeal because he sought to alter the district court's judgment in two ways: (A) he requested additional relief, and (B) he attempted to change the disposition of his *Spisak* claim.

A. It is uncontested that a cross-appeal is required for an appellee to seek greater relief. And petitioner did just that by raising his *Spisak* claim in the court of appeals. The district court's order entitled petitioner to a resentencing that was free of the *Wiggins* errors the court had identified. His rejected *Spisak* claim would have entitled him to a resentencing that was free of the asserted *Spisak* error as well. In other words, petitioner's claim would have enlarged the federal decree in his favor—and a cross-appeal is always necessary to enlarge one's rights under the judgment. See *United States* v. *American Ry. Express Co.*, 265 U.S. 425, 435-36 (1924).

B. Moreover, a judgment cannot be reduced to the relief granted. In particular, a judgment incorporates the disposition of every claim. See Restatement (Second) of Judgments § 17 (1982). For this reason, a change in the disposition of a claim *always* alters a judgment, even if the relief granted remains the same. This Court has recognized as much, making clear that "[w]hen a judgment disposes of separate claims, cross-appeals are necessary to present arguments relating to a different claim than that covered by the initial appeal." Robert L. Stern, *When to Cross-Appeal or Cross-Petition—Certainty or Confusion?*, 87 Harv. L. Rev. 763, 767 (1974) (discussing *Helvering* v. *Pfeiffer*, 302 U.S. 247 (1937), and *Alexander* v. *Cosden Pipe Line Co.*, 290 U.S. 484 (1934)). Here, petitioner was required to cross-appeal because the claim he lost (under *Spisak*) was distinct from those he won (under *Wiggins*).

II. Petitioner also needed a certificate of appealability to raise his *Spisak* claim.

A. Among the courts to consider the question, a clear majority holds that prisoners need COAs to defend habeas victories on alternative grounds. The majority view represents the better reading of the statute, and it properly effectuates the COA's purposes. Petitioner's approach, by contrast, would allow a prisoner who prevails on a single claim in the district court to raise an unlimited number of frivolous claims on appeal.

B. Petitioner would need a COA even if he were correct that this suit involved only a single, unitary claim for ineffective assistance of counsel. That is because AEDPA requires a COA to "indicate which specific *issue or issues*" are debatable. 28 U.S.C. 2253(c)(3) (emphasis added). Indeed, the only court of appeals in the country that agrees with petitioner's unitary theory of ineffective assistance has held that a COA is required for every separate issue within an ineffectiveness claim. *Peterson* v. *Douma*, 751 F.3d 524, 529 n.1 (7th Cir. 2014). Here, even if petitioner's *Wiggins* and *Spisak* contentions somehow constitute one "claim," they indisputably present separate "issues."

Finally, all of petitioner's arguments are beside the point. Even assuming he is correct about the question presented, the only relief he could win is a remand to the Fifth Circuit for consideration of his *Spisak* claim. Pet'r Br. 37. But the court of appeals already has considered that claim on the merits and rejected it under the COA standard. See JA68 ("[H]is motion for a COA is DENIED."). This means that the court of appeals already has evaluated the *Spisak* claim and found it so weak as to not present a debatable question. It follows *a fortiori* that the claim would fail on remand.

ARGUMENT

I. PETITIONER NEEDED TO CROSS-APPEAL

Petitioner's certiorari petition and merits brief present two different formulations of the cross-appeal rule. Under either one, he needed to cross-appeal.

According to petitioner's merits brief (at, *e.g.*, 11), an appellee must cross-appeal only if he seeks to expand the relief he won below. But that is exactly what petitioner did: he asked the Fifth Circuit to award him a federal habeas remedy for his *Spisak* claim, in addition to the federal habeas remedies he already had won for his *Wiggins* claims. Accordingly, his request for additional relief required a cross-appeal.

At the certiorari stage, petitioner acknowledged that the cross-appeal rule also turns on whether a prisoner seeks to prevail on additional *claims*, even if those claims do not seek additional *relief*. Specifically, he admitted that a cross-appeal is required "where a petitioner raises multiple grounds for relief; the district court grants relief on fewer than all grounds; the respondent appeals; and the petitioner seeks review of the grounds on which relief was denied." Pet. 38. Petitioner violated that rule by asking the court of appeals to change the disposition of his *Spisak* claim without a cross-appeal.

A. Petitioner Was Required To Cross-Appeal Because He Sought Additional Relief

Petitioner is wrong to suggest that he "could not have cross-appealed" the district court's conditional-release order because it "granted him all the relief that he requested." Pet'r Br. 7, 10. The district court ordered the State to fix the *Wiggins* errors identified in its opinion. But the district court rejected petitioner's *Spisak* claim, and accordingly did not order the State to fix that alleged error as well. In pursuing his *Spisak* claim in the

Fifth Circuit, petitioner sought additional relief—namely, an expanded federal-court order against the State. And any effort to obtain additional relief requires a cross-appeal.

1. Petitioner sought to enlarge his rights

a. The district court entered a conditional-release order based on the *Wiggins* errors it identified. See JA35. Such orders are a conventional tool in the arsenal of the federal courts. See *Herrera* v. *Collins*, 506 U.S. 390, 403 (1993); Brian R. Means, *Federal Habeas Manual* § 13:12 (2014). A conditional-release order allows a federal court to "delay the release of a successful habeas petitioner in order to provide the State an opportunity to correct the constitutional violation found by the court." *Hilton* v. *Braunskill*, 481 U.S. 770, 775 (1987); see *Wilkinson* v. *Dotson*, 544 U.S. 74, 87 (2005) (Scalia, J., concurring) ("Conditional writs enable habeas courts to give States time to replace an invalid judgment with a valid one."); *id.* at 89 (Kennedy, J., dissenting) (A conditional writ "order[s] that a state release the prisoner or else correct the constitutional error through a new hearing."). The point of a conditional-release order is to identify the constitutional error and ensure that the State fixes it. *E.g.*, *White* v. *Sowders*, 644 F.2d 1177, 1185 (6th Cir. 1980) ("Our function is merely to review alleged constitutional errors and, upon finding such, to impose remedies adequate to vindicate the constitutional rights denied.").

Here, the district court gave Texas three options for curing the *Wiggins* errors: release, resentence to a term of imprisonment, or grant a new sentencing hearing. JA35. The first two options would cure the constitutional infirmity by not imposing a death sentence. The third option, a new sentencing hearing, would cure the *Wiggins* errors by not committing them again. In other

words, Texas could not have complied with the order merely by conducting a new hearing; the hearing had to be free of "the constitutional violation found by the [federal] court." *Hilton*, 481 U.S. at 775; see, *e.g.*, *Chioino* v. *Kernan*, 581 F.3d 1182, 1186 (9th Cir. 2009) ("[T]he district court's responsibility was to ensure that Petitioner was sentenced utilizing a constitutionally sound procedure."); *Gentry* v. *Deuth*, 456 F.3d 687, 692 (6th Cir. 2006) ("A state's failure to timely cure the error identified by a federal district court in its conditional habeas order justifies the release of the petitioner."); *Smith* v. *Lucas*, 9 F.3d 359, 366 (5th Cir. 1993) ("The Supreme Court has recognized the conditional use of the writ to require constitutional compliance." (citing *Richmond* v. *Lewis*, 506 U.S. 40, 52 (1992)).

To illustrate, consider a habeas applicant with two meritorious guilt-phase habeas claims—an ineffective-assistance-of-counsel claim under *Strickland* v. *Washington*, 466 U.S. 668 (1984), and a coerced-confession claim under *Arizona* v. *Fulminante*, 499 U.S. 279 (1991). If the district court granted relief on the *Strickland* claim but rejected the *Fulminante* claim, petitioner's theory would dictate that the prisoner is not aggrieved. After all, the prisoner got all the relief he requested, namely, a new trial. See Pet'r Br. 10 (claiming that petitioner had gotten "all the relief he requested—a new sentencing hearing").

But the prisoner *would be* aggrieved because an order directing the State to cure the *Strickland* error is not the same as an order directing the State to cure both the *Strickland* and *Fulminante* errors. An order of the former type would allow the State to reintroduce the same coerced confession at a second trial. And it should be common ground that a prisoner is harmed by an order exposing him to a second unconstitutional proceeding.

See *Steffel* v. *Thompson*, 415 U.S. 452 (1974) (finding Article III injury in the threat of a constitutionally-tainted trial in state court).

That injury allows the prisoner to cross-appeal. It is well-settled that "the concrete cost of an additional proceeding" is an "injury in fact" that supports a cross-appeal. *Sea-Land Serv., Inc.* v. *DOT*, 137 F.3d 640, 647-48 (D.C. Cir. 1998); accord *Crowley Caribbean Transp., Inc.* v. *Pena*, 37 F.3d 671, 674 (D.C. Cir. 1994); see also *Memphis Light, Gas & Water Div.* v. *Craft*, 436 U.S. 1, 12 n.12 (1978) (respondents should have cross-petitioned to request additional procedures beyond those ordered by the court of appeals). A successful cross-appeal would avoid the additional proceeding by curing the *Fulminante* error before the State recommits it.[1]

b. By contrast, petitioner's logic would foreclose a cross-appeal because the *Fulminante* claim would not change the specific wording of the new-trial order. *E.g.*, Pet'r Br. 9-10. Consequently, petitioner would leave the hypothesized prisoner powerless to prevent a second trial tainted by the *Fulminante* error. The government could choose not to appeal; it then would be free to retry the prisoner reusing the coerced confession (this time

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[1] A prisoner's successful cross-appeal could also avoid the subsequent proceeding altogether. For instance, if the habeas applicant prevailed on the cross-appeal of his *Fulminante* claim, the government may be unable or unwilling to retry the applicant at all. By preventing the cross-appeal, petitioner would condemn that applicant to an unnecessary retrial and force the applicant to confront the vagaries of a subsequent appeal. To pick another example, a successful cross-appeal for inappropriate admission of aggravating evidence at sentencing, cf. *Johnson* v. *Mississippi*, 486 U.S. 578 (1988), could cause the government to resentence a habeas applicant to a term of years instead of forcing the applicant to undergo another capital-sentencing hearing.

with the imprimatur of the federal district court). And even if the government did appeal, the prisoner could not cross-appeal. Accordingly, the prisoner could not ensure that the court of appeals would consider the *Fulminante* claim—after all, the court could simply affirm on the *Strickland* claim and stop there.

Those harsh results stem from petitioner's reductionist view of conditional-release orders. Courts use a variety of formulations in such orders, but their substantive effects are identical. The most common approach is to provide the option of a "new trial" or "new sentencing," as the district court did in this case.[2] Often, however, conditional-release orders make it more explicit that the constitutional defect must be cured in the new proceeding. This can be done by describing the error that must be fixed,[3] requiring that further proceedings be consistent with the opinion,[4] or simply stating that the further proceedings must be constitutional.[5] This Court has used a variety of these

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[2] See, *e.g.*, *Matthews* v. *Abramajtys*, 319 F.3d 780, 790 (6th Cir. 2003); *Mayfield* v. *Woodford*, 270 F.3d 915, 932-33 (9th Cir. 2001); *Garcia* v. *Portuondo*, 459 F. Supp. 2d 267, 295 (S.D.N.Y. 2006). See generally *Herrera*, 506 U.S. at 403; Means, *supra*, § 13:12.

[3] See, *e.g.*, *Taylor* v. *Maddox*, 366 F.3d 992, 1017-18 (9th Cir. 2004); *Roe* v. *Delo*, 160 F.3d 416, 420 (8th Cir. 1998).

[4] See, *e.g.*, *Coulter* v. *Gilmore*, 155 F.3d 912, 922 (7th Cir. 1998); *Frey* v. *Fulcomer*, 132 F.3d 916, 925 (3d Cir. 1997); *Walker* v. *Deeds*, 50 F.3d 670, 673 (9th Cir. 1995).

[5] See, *e.g.*, *Gardner* v. *Johnson*, 247 F.3d 551, 564 (5th Cir. 2001).

formulations, ranging from the very general to the very specific.[6]

But no matter what the wording of a conditional-release order, it always requires the State to fix the constitutional errors that the federal court identifies. See, *e.g.*, *Lafler* v. *Cooper*, 132 S. Ct. 1376, 1388 (2012) (federal habeas remedy must "neutralize the taint of a constitutional violation" (internal quotation marks omitted)); *Wolfe* v. *Clarke*, 718 F.3d 277, 285 (4th Cir. 2013) (explaining that the purpose of a conditional order is to "permit[ ] the state authorities to remedy the constitutional defects"); 2 Randy Hertz & James S. Liebman, *Federal Habeas Corpus Practice and Procedure* § 33.1 (6th ed. 2011) (conditional order "requires release in the event that [an] action sufficient to cure the violation does not occur within a period of time"). As the Fifth Circuit has explained, a conditional-release order may "suggest a corrective procedure in broad terms," but "the real thrust of the order is to alert the state court to the

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[6] See, *e.g.*, *Rompilla* v. *Beard*, 545 U.S. 374, 393 (2005) ("Pennsylvania must either retry the case on penalty or stipulate to a life sentence."); *Richmond*, 506 U.S. at 52 (instructing lower courts to grant the writ unless the State "either corrects the constitutional error in petitioner's death sentence or vacates the sentence and imposes a lesser sentence consistent with law"); *Parker* v. *Dugger*, 498 U.S. 308, 322-23 (1991) (instructing lower courts to "direct[ ] the State * * * to initiate appropriate proceedings in state court so that [petitioner's] death sentence may be reconsidered in light of the entire record of his trial"); *Cabana* v. *Bullock*, 474 U.S. 376, 392 (1986) (instructing the district court to give the State a choice of imposing life imprisonment or "obtaining a determination from its own courts of the [relevant] factual question"); *Brewer* v. *Williams*, 430 U.S. 387, 406 n.13 (1977) (suspending the issuance of the writ for sixty days "to allow the State * * * an opportunity to initiate a new trial").

constitutional problem and notify it that the infirmity must be remedied." *Smith*, 9 F.3d at 367.

Here, the district court could have chosen a more specific formulation for its judgment and ordered the State to "resentence petitioner to a term of imprisonment or conduct a new sentencing hearing free of the *Wiggins* errors." Even petitioner presumably would concede that if the judgment had been phrased that way, he could have cross-appealed his *Spisak* claim. After all, if he prevailed on that claim, the text of the judgment would have to be modified to specify that the new sentencing hearing must be free of the *Spisak* error as well. Furthermore, the *Spisak* claim would not be an "argument supporting the judgment," Pet'r Br. 9, because it obviously could not support the requirement of avoiding *Wiggins* errors.

Likewise, petitioner presumably would concede that he could have cross-appealed if the judgment ordered a "new sentencing hearing not inconsistent with this opinion." Although his *Spisak* claim would no longer require a change in the phrasing of the judgment, it would self-evidently change the meaning of the judgment.

The result is no different where, as here, the order standing alone does not specify *how* the retrial is to be conducted. Consider *Brewer*, in which this Court granted habeas relief because of the "clear * * * violation of the Sixth and Fourteenth Amendments" which occurred when certain uncounseled statements were introduced at the petitioner's trial. 430 U.S. at 406. The Court ordered Iowa "to initiate a new trial" within sixty days, with no explicit direction to cure the constitutional error. *Id.* at 406 n.13. But it is inconceivable that Iowa could have complied with that order by reintroducing the evidence at the retrial. Accord *Matthews*, 319 F.3d at 790 (suggesting that, although the conditional-release order

required only a "new trial," the new trial must comply with the opinion).

And when States violate conditional-release orders, federal courts enforce them. "A conditional order's framework contemplates that a district court will eventually make an assessment concerning compliance with its mandate." *Phifer* v. *Warden*, 53 F.3d 859, 865 (7th Cir. 1995). Moreover, federal courts are prepared to release a prisoner if state officials do not comply with their conditional-release orders. See, *e.g.*, Means, *supra*, § 13:10 (collecting cases). One court of appeals, for example, upheld an immediate-release order because the State failed to discern and comply with the "intention" and "objective" of the district court's previous order. *Wolfe*, 718 F.3d at 279, 287-88.

In short, petitioner cannot simply point to the text of the conditional-release order and declare victory. As Wright and Miller have observed, an exclusive focus on the judgment's phrasing "quickly leads to difficulty * * * since equally significant practical effects can flow from findings that are not incorporated in a decree." 15A Charles Alan Wright et al., *Federal Practice and Procedure* § 3902 (Supp. 2014) ("Wright & Miller"); accord *Black* v. *Cutter Labs.*, 351 U.S. 292, 298 (1956) (Courts must "look beyond the broad sweep of the language and determine * * * precisely the ground on which the judgment rests."). The "practical effect" of a conditional-release order depends on its particular conditions. Petitioner sought to impose an additional condition: that the State must conduct the resentencing without the alleged *Spisak* error. Petitioner therefore sought additional re-

lief,[7] and he was entitled to cross-appeal to pursue that relief.

c. There is nothing remarkable about that result. Lawyers know it, and courts rely on it, in habeas and non-habeas cases alike.

For example, the habeas applicant in *Lam* v. *Kelchner* challenged the admissibility of several statements at the guilt-phase of her trial. 304 F.3d 256 (3d Cir. 2002). The district court (Pollak, J.) granted relief as to the involuntariness of Lam's statements but denied her Confrontation Clause challenge to different statements by a third-party. *Id.* at 263. Judge Pollak's conditional-release order specified the precise evidence to be excluded should the State retry her. See App., *infra*, at 18a-19a ("At such a retrial, the following evidence must be excluded: * * * "). The State appealed the voluntariness claim, and Lam cross-appealed the Confrontation Clause claim. And in considering both parties' appeals, the court of appeals recognized that the latter claim requested additional relief—even though it would not entitle Lam to an additional proceeding. See *Lam*, 304 F.3d at 270 ("On cross-appeal, Lam requests suppression of government testimony [on Confrontation Clause grounds].").

Likewise, the habeas applicant in *Moore* v. *Hardee* advanced multiple guilt-phase ineffectiveness claims in the district court. 723 F.3d 488, 493 (4th Cir. 2013). The district court granted one and rejected the rest. *Id.* at 494-95. And the district court's judgment there was materially identical to the one here. See App., *infra*, at 17a ("A writ of habeas corpus vacating petition-

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[7] Petitioner admitted as much at the certiorari stage, noting that the district court "granted relief on two allegations * * * but denied relief on the third allegation." Pet. 11.

er's conviction shall issue, and the State of North Carolina shall release petitioner from its custody unless, within 180 days from the date of this order, the State initiates a new trial against petitioner."). The State appealed the claim it lost, and Moore cross-appealed one of the claims he lost. *Id.* at 495. According to petitioner here, Moore's cross-appeal was improper—after all, the cross-appealed claim would not have entitled him to any additional proceedings. Nevertheless, the Fourth Circuit considered the cross-appeal on the merits. *Id.* at 499-500.

Other examples abound.[8] Indeed, in *Lawhorn* v. *Allen*, the Eleventh Circuit made clear that a habeas applicant *must* cross-appeal to raise "claims denied by the district court." 519 F.3d 1272, 1285 n.20 (2008). And the court of appeals concluded that the prisoner was attempting "to enlarge the relief granted by the district court." *Ibid.*; see also *Wiley* v. *Epps*, 625 F.3d 199, 204 n.2 (5th Cir. 2010) (declining to consider the "additional claims" the habeas applicant had not cross-appealed).

The rules of appealability operate the same way in non-habeas cases. In a variety of contexts, prevailing parties can appeal decisions "that adversely affect[] [their] legal rights or position vis-à-vis other parties in the case or other potential litigants." *Custer* v. *Sweeney*, 89 F.3d 1156, 1164 (4th Cir. 1996); see Wright & Miller,

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[8] See, *e.g.*, *Magwood* v. *Culliver*, 555 F.3d 968, 970, 978-79 (11th Cir. 2009), *rev'd on other grounds sub nom. Magwood* v. *Patterson*, 561 U.S. 320 (2010); *Helmig* v. *Kemna*, 461 F.3d 960, 962, 966-67 (8th Cir. 2006); *Parle* v. *Runnels*, 387 F.3d 1030, 1033, 1042-45 (9th Cir. 2004); *Smith* v. *Cockrell*, 311 F.3d 661, 667, 683-84 (5th Cir. 2002), *abrogated on other grounds by Tennard* v. *Dretke*, 542 U.S. 274 (2004); *Jackson* v. *Herring*, 42 F.3d 1350, 1353 (11th Cir. 1995); cf. *Kelley* v. *Secretary for Dep't of Corr.*, 377 F.3d 1317, 1333 (11th Cir. 2004) (noting Kelley "[did] not cross-appeal" claims which, according to petitioner here, Kelley could not have cross-appealed).

supra, § 3902 (noting that a "ruling that may control future events may support appeal even though the appellant has won the present dispute on an alternative ground"). Thus, parties can appeal to challenge the collateral-estoppel effect of an otherwise-favorable ruling,[9] to protect a victory that could be jeopardized by the other side's appeal,[10] to urge alternative bases for quashing a subpoena,[11] and to contest the validity of a patent even if the appellant faces no liability because the judgment finds no infringement.[12] The common thread running through those otherwise-disparate contexts is that appellate courts "accord[] the party aggrieved concept a practical rather than hypertechnical meaning." *Custer*, 89 F.3d at 1164 (internal quotation marks and ellipses omitted); see also *In re Indian Motocycle Co.*, 452 F.3d 25, 30 (1st Cir. 2006) (appeals are permissible where the appellant would suffer "foreseeable practical consequences").

Petitioner here was at least as "aggrieved" as the appellants discussed above. A subpoena may or may not be reissued, so the consequences beyond its immediate quashing are to some extent remote and uncertain. Cf. *Shell Oil*, 466 U.S. at 60 & n.5 (requiring cross-appeal

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[9] See, *e.g.*, *Agripost, Inc.* v. *Miami-Dade County*, 195 F.3d 1225, 1230 (11th Cir. 1999).

[10] See, *e.g.*, *Art Midwest Inc.* v. *Atlantic Ltd. P'ship XII*, 742 F.3d 206, 212 (5th Cir. 2014) (noting that the "consensus of circuit authority" supports such "conditional" cross-appeals).

[11] See, *e.g.*, *EEOC* v. *Shell Oil Co.*, 466 U.S. 54, 60 & n.5 (1984).

[12] See, *e.g.*, *Electrical Fittings Corp.* v. *Thomas & Betts Co.*, 307 U.S. 241, 242 (1939); *Lazare Kaplan Int'l, Inc.* v. *Photoscribe Techs., Inc.*, 714 F.3d 1289, 1295 (Fed Cir. 2013); *Radio Sys. Corp.* v. *Lalor*, 709 F.3d 1124, 1132 (Fed. Cir. 2013).

anyway).[13] But a habeas applicant with a winning *Wiggins* claim almost certainly will face a second hearing over the validity of his sentence—indeed, that is a proceeding that the State must conduct to retain the prisoner's sentence. See Pet'r Br. 10 (conceding that a new sentencing hearing is inevitable because it is "all the relief that he requested"). The district court in this case denied petitioner an alleged constitutional right in that proceeding; accordingly, he was aggrieved and entitled to cross-appeal.

2. Petitioner must cross-appeal to enlarge his rights

Because petitioner requested additional relief in the court of appeals, he not only could cross-appeal but he was required do so. That much is clear from *American Railway*, which mandates a cross-appeal whenever an appellee seeks to "enlarge[] his own rights" under a judgment. 265 U.S. at 435. This principle has been repeatedly reaffirmed by this Court's equitable-remedy cases, which require a cross-appeal to effectuate any modification of the decree. The logic of those cases applies straightforwardly to habeas, which is likewise governed by equitable principles.

a. Any attempt to change the terms of an equitable remedy constitutes an attack on the decree and requires a cross-appeal. *E.g.*, *Morley Constr. Co.* v. *Maryland Cas. Co.*, 300 U.S. 185, 191, 193 (1937). As Justice Cardozo explained for the Court in *Morley*, an equitable "decree conforms to the findings in its distribution of relief." *Id.* at 189. That is, every "finding[]" is integral to

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[13] Such uncertainty might justify *United States* v. *Hilger*, in which the court agreed to consider alternative grounds for dismissal of an indictment in the absence of a cross-appeal. 867 F.2d 566, 567 (9th Cir. 1989).

the "conscience of the Chancellor," and no part of it can be attacked without attacking the decree itself. *Id.* at 193. In *Morley*, the surety company won a claim for exoneration, but it lost a claim for specific performance. *Id.* at 189-90. From the surety's perspective, there was little if any difference between these remedies; the only distinction that the Court could identify was which bank would hold the money for the surety's liabilities. *Id.* at 192-93. But those similarities "surely" did not justify "treat[ing] the two as interchangeable. One might as well say that at the instance of a non-appealing plaintiff a judgment for specific performance could be made to take the place of one for the recovery of damages." *Id.* at 193.

The same principles require cross-appeals to modify other equitable remedies, like injunctions. As Wright and Miller explain:

> Injunction appeals require careful attention. An injunction framed to grant relief on one theory often would be shaped differently were relief based on a different theory. A party who has won an injunction thus is well advised to take a cross-appeal if it wishes to argue an alternative basis for injunctive relief.

Wright & Miller, *supra*, § 3904. That is why this Court has held that each "portion[ ] of the District Court's [injunction]" must be separately appealed. *El Paso Natural Gas Co.* v. *Neztsosie*, 526 U.S. 473, 479 (1999). And it is why federal appellate courts routinely require cross-appeals to modify the terms of an injunction. See, *e.g.*, *Ball* v. *Rodgers*, 492 F.3d 1094, 1119 (9th Cir. 2007); *High Tech Med. Instr., Inc.* v. *New Image Indus.*, 49 F.3d 1551, 1557-58 (Fed. Cir. 1995); *Haitian Refugee Ctr., Inc.* v. *Baker*, 949 F.2d 1109, 1111 (11th Cir. 1991).

b. Conditional-release orders are quintessentially equitable remedies. See *Munaf* v. *Geren*, 553 U.S. 674,

693 (2008) ("Habeas corpus is governed by equitable principles." (internal quotation marks omitted)); *Schlup* v. *Delo*, 513 U.S. 298, 319 (1995) ("[H]abeas corpus is, at its core, an equitable remedy."); *Hilton*, 481 U.S. at 775 ("[A] court has broad discretion in conditioning a judgment granting habeas relief."). It follows that a habeas applicant must cross-appeal to change the terms of a conditional-release order.

For example, in *Berkemer* v. *McCarty*, 468 U.S. 420 (1984), the habeas applicant contended that the admission of his pre- and post-arrest statements violated his *Miranda* rights. The court of appeals deemed his *post*-arrest statements inadmissible and issued a conditional-release order. See *McCarty* v. *Herdman*, 716 F.2d 361, 364 (6th Cir. 1983) ("[W]e remand the case to the district court for the issuance of a writ of habeas corpus, giving the State of Ohio ninety days in which to retry McCarty."). But the Sixth Circuit did not clearly resolve the admissibility of the *pre*-arrest statements.

After this Court granted the State's certiorari petition, McCarty sought to exclude both his pre- and post-arrest statements without cross-petitioning. 468 U.S. at 435. The Court noted that McCarty "might be * * * disentitled" to litigate the admissibility of his pre-arrest statements without a cross-petition. *Id.* at 435 n.23. This concern would be nonsensical under petitioner's view, which would bar McCarty from cross-appealing because he had already obtained a new trial. But the Court carefully addressed the concern and reached the pre-arrest statements only because the Sixth Circuit's decision cast doubt on their admissibility. See *ibid.* And because the Sixth Circuit's opinion could be construed "[w]ithout undue strain" to exclude those statements, this Court could

interpret McCarty's argument as "support[ing] the judgment below." *Ibid.*[14]

McCarty is outcome-determinative here. The district court unambiguously rejected petitioner's *Spisak* claim. See JA28-29. So it would be impossible to interpret petitioner's *Spisak* arguments as supporting the decision below.

c. Petitioner ignores all of this and instead relies on a handful of cases that demonstrate the lengths to which he must go to find support for his position. Most of his cases are irrelevant because they involve uncontroversial applications of the cross-appeal rule to circumstances that have no bearing on this case. Only three of petitioner's cases warrant discussion, and all three are inconsistent with this Court's enunciation of the cross-appeal rule and petitioner's own understanding of it.

First, in *Drax* v. *Reno*, the Second Circuit excused the appellee's failure to cross-appeal even though his claim required the court to explicitly "modif[y]" the district court's judgment. 338 F.3d 98, 119 (2d Cir. 2003). Even petitioner does not endorse such a square rejection of the inveterate and certain cross-appeal rule. Compare *Morley*, 300 U.S. at 187 (holding cross-appeal necessary "to modify a decree").

Similarly, petitioner misplaces his faith in *Maryland Casualty Co.* v. *State Bank & Trust Co.*, 425 F.2d 979 (5th Cir. 1970). There the court allowed a non-appealing

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[14] The Court added that it was unwilling "to interpret and apply strictly the [cross-appeal] rule." *McCarty*, 468 U.S. at 435 n.23. That statement led some to believe that the Court "countenanc[es] exceptions to the cross petition requirement," but this Court has since "made clear that such a view * * * is mistaken." *El Paso*, 526 U.S. at 480 n.3 (citing *Northwest Airlines, Inc.* v. *County of Kent*, 510 U.S. 355, 365 n.8 (1994)).

party to advance a $40,000 claim "in support of" a $50,000 judgment. *Id.* at 980-82. Again, that is obviously wrong and foreclosed by this Court's precedents. See *County of Los Angeles* v. *Davis*, 440 U.S. 625, 630 n.3 (1979); *Federal Energy Admin.* v. *Algonquin SNG, Inc.*, 426 U.S. 548, 560 n.11 (1976); accord Eugene Gressman et al., *Supreme Court Practice* 489 (9th ed. 2007) ("An argument that would modify the judgment *even in a way that provides less relief* cannot be presented without filing a cross-appeal." (emphasis added)).

Finally, *French* v. *Estelle*, 692 F.2d 1021 (5th Cir. 1982), is wrong and shows why petitioner is too. First, *French* is wrong because the court of appeals expanded the prisoner's relief without a cross-appeal. The district court found a sentencing-phase ineffectiveness error and, consistent with then-existing Texas law, ordered the State to conduct new guilt- and punishment-phase hearings within ninety days. See *French*, 692 F.2d at 1023 n.2 ("Although the error relates to punishment only, Texas law does not allow a court to reform the sentence or remand for a new trial solely on punishment * * *."). The court of appeals, however, expanded French's relief by holding that the Double Jeopardy Clause barred the State from using certain aggravating evidence at resentencing. *Id.* at 1023. Even petitioner agrees that an appellee must cross-appeal to alter the type of retrial the State may conduct, see Pet'r Br. 16, and rightly so, see *American Ry.*, 265 U.S. at 435 (appellee may not "enlarg[e] his own rights" without cross-appeal).

Second, *French* also proves that petitioner's single-minded focus on the text of the judgment is misplaced. See Pet'r Br. 7. Because Texas law required a new trial as a result of both the Double Jeopardy and ineffectiveness errors, the Fifth Circuit did not alter the text of the district court's conditional-release order. See *French*,

692 F.2d at 1025 ("That portion of the district court's decision granting a writ of habeas corpus unless the State elects to retry the petitioner within ninety days is accordingly affirmed."). But it is obvious that the court of appeals expanded the prisoner's relief, and it is only by refusing to look beyond the bare text of the judgment that petitioner can argue otherwise.

B. Petitioner Was Required To Cross-Appeal A Claim He Lost Below

Even if petitioner did not request additional *relief* in the court of appeals, he still violated the cross-appeal rule by trying to change the disposition of a *claim* that he lost in the district court. As petitioner has acknowledged, "[t]he rule requiring a separate notice of appeal * * * should apply where a petitioner raises multiple grounds for relief; the district court grants relief on fewer than all of the grounds; the respondent appeals; and the petitioner seeks review of the grounds on which relief was denied." Pet. 38. Although petitioner tacitly abandons that position in his merits brief, it remains the law. And it required petitioner to cross-appeal his *Spisak* claim.

1. Petitioner must cross-appeal to change the disposition of a claim

Petitioner was required to cross-appeal the claim he lost. That is because, under the law of judgments, an attack on the disposition of a claim constitutes an attack on the judgment itself. And this Court has squarely rejected petitioner's argument that the only way to alter a judgment is to "enlarge the relief granted by the district court." Pet'r Br. 16.

a. The law of judgments forecloses petitioner's view that a judgment can be reduced to the relief it grants. To the contrary, a judgment also incorporates the plaintiff's claims: prevailing claims are merged into the judgment, and losing claims are barred by it. See, *e.g.*, Restatement (Second) of Judgments § 17 (1982); David L. Shapiro, *Preclusion in Civil Actions* 32 (2001); *Cooper* v. *Federal Reserve Bank*, 467 U.S. 867, 874 (1984). That is why any attack on the disposition of a claim is an attack on the judgment itself. See Shapiro, *supra*, at 15; cf. *Plaut* v. *Spendthrift Farm, Inc.*, 514 U.S. 211, 225-26 (1995).

While an appellee need not cross-appeal to raise an "argument" or to launch "an attack upon the reasoning of the lower court," *American Ry.*, 300 U.S. at 435, an appellee must cross-appeal to change the disposition of a claim. As Professor Moore put it:

> It would be possible to consider a judgment as a sum of money without regard to its source and permit an appellee who was awarded $10,000 to support his judgment by any argument raised by the record that would entitle him to $10,000 or more. The Supreme Court has rejected this view, holding that an appellee may not defend the sum of a money judgment by arguing that any improper allowance of *claims* * * * are offset by failure to allow * * * others.

9 James Moore, *Moore's Federal Practice* ¶ 204.11[3] (2d ed. 1996) (emphasis added; citing *Pfeiffer*, 302 U.S. 247, and *Alexander*, 290 U.S. 484).

b. Both *Pfeiffer* and *Alexander* held that a cross-appeal is required to press a failed claim on appeal—even if that claim would not expand the appellee's relief. In the former, the Commissioner of Internal Revenue assessed tax deficiencies against Pfeiffer for failure to

include two items in her income tax return: a stock dividend and a cash payment. *Pfeiffer*, 302 U.S. at 248. Pfeiffer contested the deficiencies at the Board of Tax Appeals, which held that only the dividend was taxable. *Ibid.* The Board assessed a deficiency of $90,000 for Pfeiffer's failure to pay tax on the dividend.

Pfeiffer appealed her liability on the dividend. The Commissioner did not cross-appeal on his cash claim. The court of appeals agreed with Pfeiffer and held that the dividend was exempt, and it "refused to consider" the Commissioner's argument in the absence of a cross-appeal. *Id.* at 250. Thus, the court of appeals reduced Pfeiffer's liability to zero.

Speaking through Justice Brandeis, this Court affirmed. As to the IRS's cash claim, the Court explained that "[w]e are not at liberty to entertain that contention." *Ibid.* "As the commissioner did not seek a review of that [Board] decision, which was adverse to him, the Circuit Court of Appeals properly refused to consider the contention." *Ibid.* Citing *American Railway*, the Court explained that "an appellee cannot without a cross-appeal attack a judgment entered below." *Id.* at 250-51. And the Court held that the Commissioner was attempting to "attack [the] judgment entered below"—even though acceptance of the Commissioner's cash claim would *not* increase the relief the IRS had already won. *Id.* at 251. Moreover, the Commissioner's failure to cross-appeal was outcome-determinative because, in a companion case decided the same day, the Court held that the cash was taxable. *Id.* at 250 (citing *Helvering* v. *Gowran*, 302 U.S. 238 (1937)).

The *Pfeiffer* dissenters embraced the exact argument that petitioner makes here. They conceded that if the Commissioner had sought "to increase the deficiency found by the Board * * * the point would be well taken,

but such is not his purpose." *Id.* at 252 (Stone and Cardozo, JJ., dissenting). They observed that the Commissioner "accepts the order and relies upon it as establishing a deficiency of which he asks the benefit only so far as it is sustained by the application * * * of the rule of law announced by this Court." *Ibid.* In other words, the *Pfeiffer* dissenters thought that a judgment is merely "a sum of money without regard to its source." Moore, *supra*, ¶ 204.11[3] (citing the dissent in *Pfeiffer*); see Pet'r Br. 7 (also embracing a relief-only view of judgments). But the Court squarely rejected that view.

Any doubt on that score is resolved by *Alexander*. There the trial court awarded monetary relief on four claims. The court of appeals upheld the decision as to two claims, overruled the third, and reduced the award granted on the fourth. 290 U.S. at 486-87. The defendant petitioned for review on the first and second claims, and the plaintiff did not cross-petition on the third and fourth. The Court held that the plaintiff could not defend the judgment in his favor by attempting to change the disposition of claims three and four. *Id.* at 487. Just like the disposition of the cash claim in *Pfeiffer*, the disposition of each claim constituted a "part of the [lower court's] decision" in *Alexander*. See Note, *Federal Jurisdiction and Procedure—Review of Errors at the Instance of a Non-Appealing Party*, 51 Harv. L. Rev. 1058, 1063 (1938) (noting that *Alexander* "appears to be a square holding supporting the decision in the *Pfeiffer*

case").[15] And of course, attacking any part of the judgment necessitates a cross-appeal.

Both cases demonstrate that even if the relief for *Wiggins* and *Spisak* claims were as fungible as money—a proposition refuted in Part I.A., *supra*—petitioner still needed to cross-appeal "the parts of the decision of the [district court] which were adverse to [him]." *Alexander*, 290 U.S. at 487. In short, an appellee who is merely attempting to defend the relief already granted still has to cross-appeal to defend that relief pursuant to a different claim.

b. The *Pfeiffer-Alexander* doctrine has endured over the decades. As Robert L. Stern summarized it in his canonical article on the cross-appeal rule,[16] "[w]hen a judgment disposes of separate claims, cross-appeals are

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[15] *Alexander* was far from the only case supporting the holding in *Pfeiffer*. See, *e.g.*, *United States* v. *Hickey*, 84 U.S. (17 Wall.) 9, 10 (1872) ("By not appealing, the claimant has declared himself to be content with the disposition of the case by the Court of Claims. The appeal brings up only the claim allowed. The rejected items, therefore, will receive no consideration."); *United States* v. *Ewing*, 140 U.S. 142, 150 (1891) (noting that "a number of items were [apparently erroneously] rejected by the court below," but that "we do not feel at liberty to consider them" in the absence of an appeal); *United States* v. *Blackfeather*, 155 U.S. 180, 186 (1894) ("As the claimant took no appeal from the judgment of the court below, of course we are not called upon to consider the numerous errors assigned in his brief to its action in refusing to make certain allowances claimed in his petition."); *Alexander*, 290 U.S. at 487 n.1 (collecting cases).

[16] That article has been cited in a number of court opinions, *e.g.*, *Arlinghaus* v. *Ritenour*, 622 F.2d 629, 638 (2d Cir. 1980) (Friendly, J.), including two by this Court, *United States* v. *Nobles*, 422 U.S. 225, 242 n.16 (1975); *United States* v. *Reliable Transfer Co.*, 421 U.S. 397, 401 n.2 (1975); see also Wright & Miller, *supra*, § 3950.7 n.16 (describing the Stern article as a "penetrating discussion of the confusion surrounding the need to file cross-appeals").

necessary to present arguments relating to a different claim than that covered by the initial appeal." Stern, 87 Harv. L. Rev. at 767. And a cross-appeal is necessary "even if the decision as to various claims merges into a single provision of the judgment, such as an order that the plaintiff recover a single sum." *Ibid.* (citing *Pfeiffer* and *Alexander*). That result was "by now well-established." *Ibid.* Any remaining confusion over it stemmed from lower courts' occasional "[f]ailure to observe the distinction between a contention, argument, or theory, on the one hand, and a claim, on the other." *Ibid.* (quoting 9 James Moore, *Moore's Federal Practice* ¶ 204.11[3] (1973)); see *Gonzalez* v. *Crosby*, 545 U.S. 524, 530 (2005) (defining "claim" as "an asserted federal basis for relief from a state court's judgment"). Contentions, arguments, and theories do not require a cross-appeal—but claims do.

Judge Friendly correctly applied those distinctions and the *Pfeiffer-Alexander* doctrine in an opinion he penned in 1980. See *Arlinghaus*, 622 F.2d 629. That case involved a lawsuit against three defendants: Ritenour, Lipsky, and Pepper. The district court found Pepper liable, but dismissed the claims against the other two. The plaintiff settled with Pepper and took an appeal as to Ritenour and Lipsky. *Id.* at 635-36.

Judge Friendly considered whether the court could affirm the dismissal of claims against Ritenour and Lipsky based on an argument they advanced without a cross-appeal. He observed that the court "might question the propriety of [accepting the argument] were this to unsettle any portion of the district court's judgment, *including the resolution of claims against [non-party] Pepper.*" *Id.* at 638 (emphasis added; citing Stern). According to petitioner, the court had nothing to worry about because altering the claims against Pepper would

have no effect on the relief awarded to the appellees. But the Second Circuit reached appellees' argument only because doing so would not disturb the claims against Pepper. *Ibid.* The court's reasoning makes clear that a cross-appeal would be necessary to change the disposition of any claim—even if the change would have zero effect on the appellees (Ritenour and Lipsky), and even if doing so would affect only a claim against a since-dismissed non-party (Pepper). *Ibid.*

It is true that not everyone agrees with Judge Friendly, and there are pockets of resistance to this Court's cross-appeal rule. But even where courts have suggested that the appellee's relief is the only thing that matters, they have acknowledged this result conflicts with the *Pfeiffer-Alexander* doctrine. See, *e.g.*, *United States* v. *Bohn*, 959 F.2d 389, 393 (2d Cir. 1992) (declining to "strictly follow[ ]" *Pfeiffer* and *Alexander*); *Doll* v. *Brown*, 75 F.3d 1200, 1207 (7th Cir. 1996) (Posner, J.) (citing *Bohn* for the proposition that the cross-appeal rule "can be excused"); *Bullard* v. *Sercon Corp.*, 846 F.2d 463, 467-68 (7th Cir. 1988) (Posner, J.) (criticizing the cross-appeal rule and arguing that it need not be followed "even in cases where the appellee is seeking to alter the judgment" if the modification is only "minor").[17]

Whatever else might be said about such attempts to under-rule the *Pfeiffer-Alexander* doctrine, there is no

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[17] Judge Posner also has expressed skepticism regarding cross-appeals in the habeas context. In a case where the habeas applicant had prevailed on some of his challenges to the constitutionality of his sentence and cross-appealed his remaining claims, Judge Posner commented that "[t]here was no need" for the cross-appeal. *Trueblood* v. *Davis*, 301 F.3d 784, 786 (7th Cir. 2002). That approach is inconsistent with the *Pfeiffer-Alexander* doctrine and habeas cases from other courts that follow the cross-appeal rule without objection. See *supra* Part I.A.1.c.

question that this Court and many courts of appeals continue to apply it on a claim-by-claim basis and without regard to whether the appellee wanted to expand the relief.[18] In fact, this Court recently reaffirmed that it "expresse[s] the [cross-appeal] rule in emphatic terms," and *Pfeiffer* was the first case it cited for that proposition. *El Paso*, 526 U.S. at 480 n.3; see also *ibid.* (disclaiming as "dictum" any contrary statement in *Bowen* v. *Postal Serv.*, 459 U.S. 212, 217-18 n.7 (1983)); accord *Greenlaw* v. *United States*, 554 U.S. 237, 245 (2008).

This Court's modern cross-appeal cases also have endorsed *Pfeiffer*—and rejected petitioner's position—in another way. Petitioner's view would "permit an appellee who was awarded $10,000 to support his judgment by any argument * * * that would entitle him to $10,000 *or more*." Moore's, *supra*, ¶ 204.11[3] (emphasis added; cit-

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[18] See, *e.g.*, *Broadcast Music, Inc.* v. *Columbia Broad. Sys., Inc.*, 441 U.S. 1, 24 & n.43 (1979) (refusing to consider alternative claims, "particularly since CBS did not file its own petition for certiorari [as to those] claims"); *Altizer* v. *Deeds*, 191 F.3d 540, 543 n.3 (4th Cir. 1999) (refusing to consider alternative claims for $1.00 nominal-damages judgment in absence of cross-appeal); accord *Haitian Refugee Ctr.*, 949 F.2d at 1111; *Art Midwest*, 742 F.3d at 212; *High Tech Med.*, 49 F.3d at 1557-58; *Segura* v. *Jones*, 259 F. App'x 95, 99 (10th Cir. 2007); *Lawhorn*, 519 F.3d at 1285 n.20. The relative rarity of cases involving multiple claims for identical relief sometimes creates the misleading impression that the relief is all that matters. For instance, in *Blum* v. *Bacon*, this Court characterized as "novel" the "view that an affirmance which does not alter the relief ordered in the judgment below 'modifies' the judgment simply because the affirmance rests on a different legal basis than the court below adopted." 457 U.S. 132, 137 n.5 (1982). But the appellant in that case "cite[d] no authority" for the proposition, much less did he call the Court's attention to the *Pfeiffer-Alexander* doctrine. *Ibid.* *Blum* merely reaffirms the principle, noted in *Pfeiffer* itself, that a party need not cross-appeal to raise an alternative argument. See *Pfeiffer*, 302 U.S. at 250-51.

ing the dissent in *Pfeiffer*). After all, if the only component that must remain constant is the relief, it should be possible to advance "arguments * * * that can be limited to support of the judgment but that logically would require modification." Wright & Miller, *supra*, § 3904. But this Court has emphatically rejected that approach. "If the rationale of an argument would give the satisfied party more than the judgment below, even though the party is not asking for more, the court has held that a cross-petition or cross-appeal must be filed." Gressman, *supra*, at 491 (emphasis added; collecting cases); see, *e.g.*, *Northwest Airlines*, 510 U.S at 364-65.

This principle cannot be reconciled with petitioner's view that the judgment is merely the relief granted. The Court's concern with the rationale for the relief reflects the vitality of the *Pfeiffer-Alexander* doctrine; for cross-appeal purposes, the entitlement to the relief matters as much as the relief itself.

2. ***Petitioner tried to change the disposition of his* Spisak *claim***

Petitioner triggered the cross-appeal requirement by trying to advance his rejected *Spisak* claim on appeal. He now attempts to avoid the cross-appeal rule by arguing the *Spisak* claim is not a "claim" at all; rather, petitioner argues, it is just a subpart of a broader, unitary ineffectiveness claim. But that argument misunderstands what a "claim" is. And petitioner's unitary theory of ineffectiveness is not merely wrong: it would have dramatic consequences for future habeas applicants.

a. Petitioner's *Wiggins* and *Spisak* claims are separate because their allegations focus on three distinct strategic judgments made by petitioner's trial counsel. As the Court said in *Strickland*, "[a] convicted defendant making a claim of ineffective assistance must identify the

acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment." 466 U.S. at 690. Put differently, it is the lawyer's failure to exercise "reasonable professional judgment" that forms the basis for an ineffectiveness claim; the lawyer's misjudgment constitutes the "asserted federal basis for relief from [the] state court's judgment of conviction." *Gonzalez*, 545 U.S. at 530. It follows that each allegedly "[un]reasonable professional judgment" forms the basis for a separate claim, even if multiple "acts or omissions" emanate from counsel's decision. The Court has consistently approached ineffectiveness claims this way. See, *e.g.*, *Ryan* v. *Gonzales*, 133 S. Ct. 696, 709 n.15 (2013) ("Claims two, five, and six are ineffective-assistance-of-counsel claims."); *House* v. *Bell*, 547 U.S. 518, 534 (2006) (noting that petitioner was "asserting numerous claims of ineffective assistance of counsel"); *Day* v. *McDonough*, 547 U.S. 198, 203 (2006) ("Day petitioned for federal habeas relief asserting several claims of ineffective assistance of trial counsel.").

To illustrate, defense counsel in *Wiggins* failed to uncover and introduce evidence that (1) Wiggins was often absent from school, (2) his mother was an alcoholic, (3) his mother once left him alone for days without food, (4) his mother physically abused him, (5) he was shuttled between foster homes, and (6) his foster father sexually abused him. See 539 U.S. at 516-17. Counsel's failure to uncover those facts constituted at least six unreasonable omissions, but they all emanated from a single misjudgment—namely, counsel's decision to "abandon[ ] their investigation of petitioner's background after having acquired only rudimentary knowledge of his history from a narrow set of sources." *Id.* at 524. It was trial counsel's decision to abandon the mitigation investigation that "fell short of the standards for capital defense work," and

that singular decision was the basis for the constitutional "claim." See *ibid.* ("[T]he investigation supporting counsel's decision not to introduce mitigating evidence of Wiggins' background * * * fell short of the professional standards.").

By contrast, *Trevino* v. *Thaler*, 133 S. Ct. 1911 (2013), turned on two analytically distinct ineffectiveness claims. As this Court observed:

> Trevino's postconviction claims included a claim that his trial counsel was constitutionally ineffective during the penalty phase of Trevino's trial, but it *did not include a claim that trial counsel's ineffectiveness consisted in part of a failure adequately to investigate and to present mitigating circumstances during the penalty phase of Trevino's trial.*

Id. at 1915 (emphasis in original; citing *Wiggins*).

In particular, Trevino properly raised a claim that his lawyer violated *Strickland* by failing to object to prejudicial hearsay testimony during the penalty phase. See Joint Appendix at 333-35, *Trevino* v. *Thaler*, 133 S. Ct. 1911 (2013) (No. 11-10189); see also *id.* at 321-49 (raising fifteen additional ineffectiveness claims). But Trevino did not raise (and hence procedurally defaulted) a distinct penalty-phase ineffectiveness claim under *Wiggins*. 133 S. Ct. at 1915-16. His defaulted *Wiggins* claim was distinct because it rested on a different "[un]reasonable professional judgment"—namely, his trial lawyer's decision not to look for certain mitigating evidence. *Strickland*, 466 U.S. at 690. Moreover, the separateness of Trevino's claims was outcome-determinative: this Court recognized in the italicized language quoted above that there would be no procedural default to excuse (and no relief to award) if ineffective assistance of counsel is always and everywhere "a single claim." Pet'r Br. 29; see

also *Walker* v. *Martin*, 131 S. Ct. 1120, 1124-26 (2011) (separateness of Walker's twenty-one ineffectiveness claims was outcome-determinative to Court's procedural-default holding).

Procedural default is not the only habeas doctrine that depends on rejecting petitioner's unitary theory of ineffectiveness. In *Rhines* v. *Weber*, the Court held that the "total exhaustion" doctrine required a prisoner to present all thirty-five of his ineffectiveness claims to the state court. 544 U.S. 269, 271-72 (2005); see Joint Appendix at 131-32, *Rhines* v. *Weber*, No. 03-9046 (U.S. Sept. 2, 2004). And the Court has held that a prisoner's inability to request appointment of a different lawyer under 18 U.S.C. 3599 turned on the fact that he wanted to raise a "new" ineffectiveness claim, in addition to the several others he already had raised. See *Martel* v. *Clair*, 132 S. Ct. 1276, 1288-89 (2012).

In short, it is not true that "this Court [has] established that ineffective assistance of counsel is a single claim," Pet'r Br. 8, nor is it true that "ineffective assistance of counsel is a single ground for relief for other purposes in the law of habeas corpus," Br. of Criminal Justice Legal Foundation as Amicus Curiae ("CJLF Br.") at 21. That resolves this case because petitioner admits that his habeas application "alleged three instances of deficient performance." Pet'r Br. 8. And rightly so; the allegedly deficient decisions that his trial counsel made—and the three ineffectiveness claims that petitioner premised on those decisions—were as disparate as those in *Trevino* and *Rhines*.

b. Petitioner's contrary assertions are wrong for three reasons.

First, his position reflects the same inattention to the meaning of "claims" that has been "responsible for much of the confusion in the cases on the subject of the necessity for cross-appeals." Stern, 87 Harv. L. Rev. at 767 (internal quotation marks omitted). An ineffectiveness *claim* comprises two *elements* (or, more colloquially, "prongs"): deficient performance and prejudice. *E.g.*, *Strickland*, 466 U.S. at 691-92. It is true that some courts have allowed prisoners to cumulate the prejudice *element* across ineffectiveness *claims*. See Pet'r Br. 33 (collecting four cases). But it does not follow that ineffective assistance of counsel is a single *claim*, any more than negligence and breach of contract are a single claim if they share an overlapping *element* (like damages).

Second, petitioner's reliance on exculpatory-information cases is self-defeating. See Pet'r Br. 30-33. It is true that the prejudice element in an ineffectiveness claim "finds its roots in the test for materiality of exculpatory information," *Strickland*, 466 U.S. at 694, and this Court has held that the materiality of exculpatory information should be measured "in terms of the cumulative effect of suppression," *Kyles* v. *Whitley*, 514 U.S. 419, 437 (1995). Even if that means that *Strickland* prejudice likewise should be measured cumulatively, it cannot mean that ineffective assistance of counsel is always and everywhere one claim, any more than suppression of multiple pieces of exculpatory evidence is always and everywhere one claim. In fact, eight members of this Court recognized that suppression-of-evidence claims are not monolithic. See *Cullen* v. *Pinholster*, 131 S. Ct. 1388, 1417-18 (2011) (Sotomayor, J., dissenting) (suppressed and exculpatory statements from second eyewitness may form "'new' claim"); *id.* at 1401 n.10 (major-

ity opinion, joined in relevant part by seven Justices) ("JUSTICE SOTOMAYOR's hypothetical involving new evidence of withheld exculpatory witness statements may well present a new claim." (citation omitted)). There would be no such thing as a "new" suppressed-evidence *claim* if petitioner were correct about the effect of cumulating the prejudice *element*. See Pet'r Br. 32-33 ("[A] court reviewing an IAC claim must consider the cumulative effect of counsel's errors on the outcome of the trial. Accordingly, * * * IAC is a single claim.").

Third, the Court should tread lightly in this area because petitioner has invited the resolution of at least three different circuit splits—none of which he identifies. Although petitioner professes that "courts that have considered the issue" are in agreement about cumulating *Strickland*'s prejudice element, *id.* at 32, the courts of appeals are deeply divided on the issue.[19] Moreover, the courts of appeals have directly considered whether ineffectiveness is a single "claim," and the clear majority re-

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[19] See, *e.g.*, *United States* v. *Thomas*, 724 F.3d 632, 648 (5th Cir. 2013) ("[T]here is no precedent supporting the idea that a series of 'errors' that fail to meet the standard of objectively unreasonable can somehow cumulate to meet the high burden set forth in *Strickland*."); *Middleton* v. *Roper*, 455 F.3d 838, 851 (8th Cir. 2006) (rejecting cumulative-error doctrine for ineffectiveness claims); *Wainwright* v. *Lockhart*, 80 F.3d 1226, 1233 (8th Cir. 1996) (holding an attorney's acts or omissions "that are not unconstitutional individually cannot be added together to create a constitutional violation"); *Jones* v. *Stotts*, 59 F.3d 143, 147 (10th Cir. 1995) (holding non-prejudicial errors cannot be cumulated to create prejudicial one); *Ochoa* v. *United States*, 2014 WL 2853736, at *3 (11th Cir. June 24, 2014) (per curiam) (recognizing separate ineffectiveness claims).

jects petitioner's view.[20] And the circuit splits are not limited to habeas: the courts of appeals also are intractably divided over what constitutes "one claim for relief" under Federal Rule of Civil Procedure 54(b).[21] However

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[20] See, *e.g.*, *United States* v. *Galloway*, 56 F.3d 1239, 1241 (10th Cir. 1995) (en banc) (rejecting proposition that "an ineffectiveness claim may be viewed as unitary, regardless of the number of separate reasons advanced in support of the claim"); *Fisher* v. *Angelone*, 163 F.3d 835, 852 (4th Cir. 1998) ("To the extent this Court has not specifically stated that ineffective assistance of counsel claims * * * must be reviewed individually, rather than collectively, we do so now. In so holding, we are in agreement with the majority of our sister circuits that have considered the issue." (footnote omitted)); *Yick Man Mui* v. *United States*, 614 F.3d 50, 56 (2d Cir. 2010) ("[L]ittle is served by a rule that causes an adjudication of a single ineffective assistance claim to preclude a later resort to the Sixth Amendment involving a different strategy, action, or inaction of counsel."); *Powell* v. *Berghuis*, 2013 WL 6620475, at *7 (6th Cir. Dec. 17, 2013) ("Powell seems to allege that because he raised some ineffective assistance claims while in state court, he has preserved all claims for this federal habeas petition. Not so."). The Seventh Circuit has reached the opposite result and held that ineffectiveness is a single "claim," see *Peoples* v. *United States*, 403 F.3d 844, 847-48 (7th Cir. 2005), but other cases in that Circuit reach conflicting results, see, *e.g.*, *Bush* v. *United States*, 765 F.2d 683, 684 (7th Cir. 1985) (Posner, J.) (holding ineffectiveness can constitute two distinct claims).

[21] See, *e.g.*, *Tolson* v. *United States*, 732 F.2d 998, 1001 (D.C. Cir. 1984) ("Rule 54(b) precedent is untidy."); *Local P-171, Amalgamated Meat Cutters* v. *Thompson Farms Co.*, 642 F.2d 1065, 1070 (7th Cir. 1981) ("[C]ourts have been completely unable to settle on a single test for determining when claims are 'separate.'"); Wright & Miller, *supra*, § 2657 ("There is no generally accepted test that is used to determine whether more than one claim for relief is before the court," and "[t]he line * * * is sometimes very obscure."); cf. *Mathis* v. *Zant*, 903 F.2d 1368, 1373 (11th Cir. 1990) (Tjoflat, C.J., concurring) ("express[ing] * * * continuing dissatisfaction" with Eleventh Circuit's application of Rule 54(b) to habeas cases).

the Court resolves this case, it should not accept petitioner's assurances that the meaning of ineffectiveness "claims" is well-settled. See Pet'r Br. 29 (asserting that "[t]his Court has held that IAC is a single claim"); compare *Forrest* v. *Florida Dep't of Corr.*, 342 F. App'x 560, 565-66 (11th Cir. Aug. 21, 2009) (noting "the absence of Supreme Court precedent").

c. Petitioner's unitary theory of ineffectiveness would have dramatic consequences. If petitioner's unitary theory is going to be law, the State will use it in future cases.[22] And some commentators will welcome that result. See CJLF Br. 16-23. Nevertheless, we candidly admit that adopting petitioner's position would shift the playing field in the State's favor.

AEDPA's relitigation bar applies "to *any claim* that was adjudicated on the merits in State court proceedings." 28 U.S.C. 2254(d) (emphasis added). And virtually every state habeas lawyer will raise at least one ineffectiveness "claim," even if only a flimsy one. See, *e.g.*, *Gallow* v. *Cooper*, 133 S. Ct. 2730, 2731 (2013) (Breyer, J., dissenting from denial of certiorari); Nancy J. King & Joseph L. Hoffman, *Habeas for the Twenty-First Century* 147-48 & tbl. 8.1 (2011) (reporting that ineffectiveness claims are raised in 81% of capital cases); Frank B. Cross & James F. Spriggs, *The Most Important (and Best) Supreme Court Opinions and Justices*, 60 Emory L.J. 407, 434 (2010) (reporting that *Strickland* is the most cited case in the federal and state courts of appeals). Under petitioner's one-and-done theory of inef-

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[22] See, *e.g.*, Brief of Appellee at 20-26, *Williams* v. *Stephens*, No. 13-70028 (5th Cir. Mar. 26, 2014) (preserving, two days after the grant of certiorari in this case, the argument that prisoner had only one ineffectiveness claim for purposes of exhaustion under 28 U.S.C. 2254(b) and procedural-default doctrine).

fectiveness, however, that cursory effort would leave any future ineffectiveness claims barred from relitigation, see *Harrington* v. *Richter*, 131 S. Ct. 770 (2011), and impossible to develop, see *Pinholster*, 131 S. Ct. at 1398 (holding that review under Section 2254(d) is limited to the record that was before the state court).

To illustrate, suppose the defense team conducts no mitigation investigation and their client is sentenced to death. The state habeas lawyer files a short petition, claiming that trial counsel were ineffective for failing to object to relatively innocuous statements made by the prosecutor during the capital-sentencing hearing. Under petitioner's unitary theory of ineffectiveness, once the state habeas court adjudicates that claim on the merits, the prisoner could never win relief on the basis of his *Wiggins* evidence. Even if the prisoner's federal habeas lawyers uncover evidence of extreme childhood neglect and secure favorable affidavits from trial counsel, the district court would be forbidden to consider them. See *Pinholster*, 131 S. Ct. at 1395.

By contrast, if ineffective assistance of counsel is not a monolithic claim, the subsequent *Wiggins* claim would not be lost. Rather, it would be procedurally defaulted, and it could be litigated de novo in federal district court if the prisoner could satisfy the equitable rules that this Court articulated in *Edwards* v. *Carpenter*, 529 U.S. 446 (2000), *Martinez* v. *Ryan*, 132 S. Ct. 1309 (2012), and *Trevino*. See, *e.g.*, *Trevino*, 133 S. Ct. at 1921 (excusing the procedural default for ineffectiveness claims that are "substantial"). If these cases mean anything—at least with respect to the most-litigated claim in federal habeas—then petitioner must be wrong.

II. PETITIONER NEEDED A CERTIFICATE OF APPEALABILITY

Even assuming that petitioner was not required to appeal, a COA still was necessary. Six circuits have embraced that view and held that a habeas applicant must obtain a COA in order to "assert * * * any ground that the district court has not adopted," even "in opposition to an appeal by the state." 20A James Moore, *Moore's Federal Practice* ¶ 322.12[2][a] (3d ed. 2014). That is also the better reading of Section 2253. And in all events, it would be a permissible and wise rule to adopt as a matter of federal common law. Accordingly, the Fifth Circuit correctly ruled that petitioner needed a COA for his *Spisak* claim.

A. The COA Requirement Applies In Government-On-Top Appeals

1. The well-settled rule requiring prisoner-appellees to get COAs dates back to the pre-AEDPA "certificate of probable cause." See 28 U.S.C. 2253 (1994). Although courts were not required—or even explicitly authorized—to limit those certificates to a specified set of issues, a number of courts experimented with that approach. *E.g.*, *Vicaretti* v. *Henderson*, 645 F.2d 100, 101 (2d Cir. 1980) (collecting cases). Limiting certificates of probable cause in this way was a "sensible attempt to focus the attention of the litigants on the issues that merit review under the relevant standard." *Id.* at 102.

As the Second Circuit observed in another case, "[p]recisely the same considerations apply when, after the writ * * * has been granted on one ground, the petitioner seeks to cross-appeal from the dismissal of other grounds." *Roman* v. *Abrams*, 790 F.2d 244, 245 (2d Cir. 1986) (per curiam). That the petitioner had prevailed on one ground did not diminish the need to "focus[] the at-

tention of litigants and the court on potentially meritorious issues, while avoiding the waste of judicial resources in a futile review of clearly meritless claims." *Ibid.*

AEDPA's COA requirement was enacted against this background. Section 2253 now proclaims as a "mandatory * * * rule," *Gonzalez* v. *Thaler*, 132 S. Ct. 641, 656 (2012), the issue-by-issue approach that *Vicaretti* and *Roman* previously embraced as a matter of practice. See 28 U.S.C. 2253(c)(3) (a COA "shall indicate which specific issue or issues" are debatable); *Slack* v. *McDaniel*, 529 U.S. 473, 484 (2000) ("[A] COA should issue when the prisoner shows, at least, that jurists of reason would find it debatable."). Courts have concluded that Section 2253 "evinces the same concern for conservation of judicial resources that led to [the] conclusion in *Roman* v. *Abrams* that a victorious habeas petitioner was not entitled to defend an appeal by the state on the basis of any rejected claim or claims unless he obtained permission to do so." *Grotto* v. *Herbert*, 316 F.3d 198, 209 (2d Cir. 2003).

Accordingly, courts of appeals have largely agreed that "a habeas petitioner to whom the writ has been granted on one or more grounds may not assert, in opposition to an appeal by the state, any ground that the district court has not adopted" without a COA. *Id.* at 209-10; see *Wiley*, 625 F.3d at 204; *Lawhorn*, 519 F.3d at 1285; *Rios* v. *Garcia*, 390 F.3d 1082, 1086-88 (9th Cir. 2004); *Manokey* v. *Waters*, 390 F.3d 767, 773-74 (4th Cir. 2004); *Fretwell* v. *Norris*, 133 F.3d 621, 623 (8th Cir. 1998). The only clear-cut exception is *Szabo* v. *Walls*,

313 F.3d 393, 397-98 (7th Cir. 2002).[23] And that decision, as the amicus notes, seems to have relied on inadequate briefing and a distorted perception of the law. CJLF Br. 11-12.

2. The majority view comports with the purpose of Section 2253, which is to "screen[ ] out issues unworthy of judicial time and attention and ensure[ ] that frivolous claims are not assigned to merits panels." *Gonzalez*, 132 S. Ct. at 650. This purpose can be served only by applying the COA requirement to *all* rejected habeas contentions, regardless of whether the applicant happened to prevail on one or more of his other contentions.

Consider two habeas applicants, X and Y, each of whom advances the same one hundred contentions. Cf. CJLF Br. 11. Ninety-nine are frivolous, and the last is debatable but ultimately incorrect. Both applicants lose all ninety-nine of the frivolous contentions, but the debatable issue comes out differently: X correctly loses and obtains a COA as to that contention, whereas Y erroneously prevails. On appeal, X would be limited to his sole colorable contention. See, *e.g.*, *Bryson* v. *United States*, 268 F.3d 560, 562 (8th Cir. 2001). According to petitioner, however, Y should be free to present each of the ninety-nine frivolous contentions to the court of appeals.

That is wrong for two reasons. First, it would constitute a windfall to Y, who would be in a better position than X by virtue of a *mistaken* decision in Y's favor. Petitioner offers no justification for such arbitrariness. Second, and more importantly, the need to shield the ap-

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[23] Petitioner also cites *Lancaster* v. *Adams*, 324 F.3d 423, 436 n.3 (6th Cir. 2003), which is somewhat unclear on this issue. At most, it would bring the count of the circuits to 6-2 against petitioner's position.

pellate court from the ninety-nine frivolous claims is identical in the two scenarios. Petitioner—and *Szabo*—are therefore wrong to suggest that "once a case is properly before the court of appeals * * * there are no remaining gates to be guarded." 313 F.3d at 398 (quoted at Pet'r Br. 23). To the contrary: the "gates to be guarded" are the same in both cases.

And as this Court has recognized, it is particularly important to guard the gates in capital cases. See, *e.g.*, *Barefoot* v. *Estelle*, 463 U.S. 880, 892-93 & n.3 (1983) (noting that Congress's principal concern in enacting the certificate requirement was "the increasing number of frivolous habeas corpus petitions challenging capital sentences"). Habeas attorneys in capital cases sometimes raise over 100 claims in an effort to preserve "all conceivable errors." *American Bar Association Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, reprinted in 31 Hofstra L. Rev. 913, 1030 (2003). Many of those claims are frivolous. See, *e.g.*, CJLF Br. 9, 14 (discussing *In re Reno*, 283 P.3d 1181, 1195 (Cal. 2012)). And as Justice Jackson observed, "[i]t must prejudice the occasional meritorious application to be buried in a flood of worthless ones." *Brown* v. *Allen*, 344 U.S. 443, 537 (1953) (Jackson, J., concurring in result).

3. This case illustrates that a prisoner's success on one claim says nothing about the likelihood of success on others. Cf. Pet'r Br. 22 (asserting the opposite). Petitioner's *Wiggins* claims, though ultimately unfounded, were plausible enough for a district judge to endorse them. JA22-28 (district court's agreement with petitioner); JA49-60 (Fifth Circuit's reversal); *Jennings*, 134 S. Ct. at 1539 (not granting certiorari on the question). But no jurist of reason could debate—and no jurist has debated—petitioner's *Spisak* claim.

The *Spisak* claim focuses on a single statement made by one of petitioner's two lawyers during closing arguments at his sentencing hearing. Petitioner's lawyers were in a tough spot: in the two months immediately following their client's parole on a thirty-year sentence for committing three felonies in a single week, petitioner committed at least fourteen additional felonies (many of them violent) before murdering a police officer "execution style" on the floor of a pornographic video arcade. See Brief of Appellant at 3-7, *Jennings* v. *Thaler*, No. 12-70018 (5th Cir. Aug. 31, 2012) (collecting record citations). Then, as now, petitioner could offer "virtually no mitigating evidence." JA29. So defense counsel did the best they could: they argued that petitioner was remorseful and asked the jury to think carefully about the sentencing decision. *E.g.*, 39RR234 (urging jurors to "turn [themselves] insides out"); *ibid.* (urging jurors not to vote rashly, like "snapping fingers"); 39RR239 (urging jurors to consider "all those facts" because if they don't, "there's no reason even—to even have a Punishment Hearing"). Defense counsel assured the jury that, if they carefully considered the decision and found that a life sentence was insufficient, "I can't quarrel with that." 39RR239. "But if you can," and "if you can see some way," "I ask you to find that mitigation, to answer one of th[e] [Special] Issues 'No.'" 39RR239-40.

There is nothing unreasonable about that strategy, and no jurist of reason would suggest that trial counsel's performance was tantamount to "no counsel at all." *Evitts* v. *Lucey*, 469 U.S. 387, 396 (1985); see *Richter*, 131 S. Ct. at 786 (applying 28 U.S.C. 2254(d)); compare *Spisak*, 558 U.S. at 151; J.W. Carney, Jr. et al., *The Closing Argument* § 35.2c (2d ed. 2011) ("[C]ounsel may make concessions in closing argument that are based on a legitimate tactical judgment."). In his application for a

COA on the *Spisak* claim, petitioner did not advance a single argument to suggest that the issue is debatable. See JA38-39. Nor could he: it is hard to imagine that anyone could criticize counsel's strategy, much less find it deficient, and much less still find it so clearly deficient that fair-minded jurists could debate the district court's application of the relitigation bar's "doubly" deferential review to petitioner's claim. *Richter*, 131 S. Ct. at 788 (internal quotation marks omitted); *Miller-El* v. *Cockrell*, 537 U.S. 322, 341 (2003). Having considered petitioner's argument-free submission, the Fifth Circuit summarily denied it. JA68. The COA requirement operated precisely as Congress intended by screening out this insubstantial claim.

4. Petitioner's only counterargument rests on what he calls the "plain language" of the statute. Pet'r Br. 7. Because Section 2253(c)(1)(A) says only that "an appeal may not be taken" without a COA, he avers that it does not apply in government-on-top appeals. Pet'r Br. 18. That is both wrong and beside the point.

a. It is wrong because "[t]ext may not be divorced from context." *University of Texas Sw. Med. Ctr.* v. *Nassar*, 133 S. Ct. 2517, 2530 (2013). If read rigidly, the text of Section 2253(c)(1) also would have "require[d] a certificate of probable cause even when an appeal is taken by a state." Fed. R. App. P. 22 advisory committee's note. Courts overwhelmingly rejected that reading as inconsistent with the purpose of COAs. *Ibid.* And the majority interpretation was ratified by AEDPA, which amended Rule 22 to provide that a COA "is not required when a state * * * appeals"—notwithstanding what petitioner would style the "plain language" of the statute. AEDPA § 103, 110 Stat. 1218 (amending Fed. R. App. P. 22(b)). In other words, courts recognized that reading

"an appeal" to mean "an appeal by anyone" would not properly effectuate the goals of the statute.

In the same way, limiting Section 2253(c)(1) to prisoner-on-top appeals would shortchange the statute. Section 2253(c)(3)'s reference to "specific issue or issues" indicates that the statute is not concerned with *appeals* by habeas applicants per se, but rather with the *issues* they present on appeal, whether as appellant or as appellee. Although Section 2253 may be "far from a *chef d'oeuvre* of legislative draftsmanship," courts must still read its words "in their context and with a view to their place in the overall statutory scheme." *Utility Air Regulatory Group* v. *EPA*, 134 S. Ct. 2427, 2441 (2014) (internal quotation marks omitted). The majority of the courts to consider the question have done just that.

b. Petitioner's "plain language" argument is also beside the point. Nothing in the text of Section 2253 forbids courts from adding COA requirements as a matter of federal common law. Twice before, the courts of appeals created additional COA requirements, and twice before this Court has approved them: "Nothing in the text of § 2253(c)(2) prohibits a circuit justice or judge from imposing additional requirements * * * [O]ne such additional requirement has been approved by this Court * * * The Court today imposes another additional requirement." *Miller-El*, 537 U.S. at 349 (Scalia, J., concurring) (discussing *Slack*). And of course, the very practice of limiting habeas applicants to a specified set of issues on appeal initially took root without any "explicit statutory authority." *Vicaretti*, 645 F.2d at 101.

The courts of appeals recognize that requiring bottom-side prisoners to obtain COAs "'focuses the attention of litigants and the court on potentially meritorious issues, while avoiding the waste of judicial resources in a futile review of clearly meritless claims.'" *Grotto*, 316

F.3d at 209 (quoting *Roman*, 790 F.2d at 245). Petitioner denigrates this as a mere "'policy justification.'" Pet'r Br. at 21 (criticizing *Grotto*). But it is *Congress's* policy concern, and it is one that comports with Congress's decision to codify only "a necessary and not a sufficient condition" on the right to present arguments on appeal. *Miller-El*, 537 U.S. at 349 (Scalia, J., concurring). As it did twice before, this Court should affirm the common-law rule adopted by the clear majority of circuits that have considered the question.

B. Petitioner Needed a COA On His *Spisak* Claim

1. It is undisputed that petitioner's *Spisak* claim at a minimum presented a different *issue* from his *Wiggins* claims: the latter involved defense counsel's omissions before sentencing, while the former involved counsel's unrelated commissions during it. Petitioner argues only that he did not need a COA because COAs are granted claim-by-claim, not issue-by-issue. Pet'r Br. 26; but see 28 U.S.C. 2253(c) (referring to "specific issue or issues"). Once again, petitioner's reasoning is both beside the point and incorrect.

The argument is beside the point because his contentions under *Spisak* and *Wiggins* are separate claims, rather than merely subsidiary parts of a unitary ineffectiveness claim. See *supra* Part I.B. So even under petitioner's claim-based reading of Section 2253(c), a COA is required.

In any event, petitioner is incorrect because Section 2253 requires prisoners to obtain a COA on each "specific issue or issues" they wish to appeal. Even the Seventh Circuit—the only court that (sometimes) agrees with petitioner's unitary theory of ineffectiveness, see *supra* n.20—has rejected petitioner's reading of Section 2253:

> [I]neffective assistance of counsel is a single claim no matter the number of attorney errors it is based on. A petitioner in Peterson's position might therefore argue that in certifying one theory of ineffective assistance we opened the door to all others. The language of § 2253, however, speaks of certifying 'issues' rather than 'claims,' and our cases treat separate theories of ineffective assistance as separate issues for purposes of § 2253.

Peterson, 751 F.3d at 529 n.1 (citation omitted); see *Gonzalez*, 132 S. Ct. at 650 (explaining that "the COA process screens out *issues* unworthy of judicial time and attention" (emphasis added)).

Petitioner's claim-by-claim approach not only conflicts with statutory text, it also conflicts with this Court's precedents. Perhaps the most common "issues" on which federal courts grant COAs are not claims at all. They are procedural issues antecedent to constitutional claims. See, *e.g.*, *Slack*, 529 U.S. at 484-85. To take just one recent example, the COA in *McQuiggin* v. *Perkins*, 133 S. Ct. 1924, 1930 (2013), was "limited to a single question: Is reasonable diligence a precondition to relying on actual innocence as a gateway to adjudication of a federal habeas petition on the merits?" That question does not state a "claim" under any definition of the word. Petitioner's claim-based reading of Section 2253 would render the *McQuiggin* COA invalid and make it impossible to comply with this Court's instruction that federal courts consider COAs on "procedural holding[s]" (i.e. issues), in addition to constitutional claims. *Slack*, 529 U.S. at 485.

2. Finally, petitioner is wrong to complain that the court of appeals dismissed his COA application for lack of jurisdiction. Pet'r Br. 34-36. The Fifth Circuit plainly

decreed that "Jennings' * * * motion for a COA is DENIED." JA68. Petitioner's COA application is so meritless that the court of appeals denied it summarily—an unsurprising result given the labor-saving purposes of the COA requirement and the fact that petitioner's one-sentence COA request was devoid of any argument. See JA39.[24]

In denying petitioner's COA request on the merits, the Fifth Circuit necessarily determined that his *Spisak* claim is not even debatable. The fact that the Fifth Circuit rejected petitioner's *Spisak* claim under the highly forgiving COA standard demonstrates that his request for relief from this Court is futile. Even if petitioner prevailed on the question presented, he would be entitled only to a remand instructing the Fifth Circuit to consider on the merits a claim that it already has rejected as too insubstantial for serious debate.

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[24] By contrast, the court dismissed petitioner's *Spisak* claim for lack of jurisdiction—both because he failed to cross-appeal and because he did not have a COA. See JA65-68 (analyzing petitioner's *Spisak* "cross-point" and ordering that "Jennings' 'cross-point' is DISMISSED"); *Gonzalez*, 132 S. Ct. at 649 (existence of COA is jurisdictional requirement). The Brief in Opposition correctly noted (at 13) that the Fifth Circuit "dismissed Jennings's cross-point and denied COA." Respondent had no occasion to discuss the issue further because the questions presented did not address petitioner's motion for a COA. In fact, petitioner did not even mention the motion at the certiorari stage.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

GREG ABBOTT
Attorney General of Texas

DANIEL T. HODGE
First Assistant
Attorney General

JONATHAN F. MITCHELL
Solicitor General

ANDREW S. OLDHAM
Deputy Solicitor General
Counsel of Record

ARTHUR C. D'ANDREA
ALEX POTAPOV
Assistant Solicitors General

AUGUST 2014

APPENDIX

CONSTITUTION OF THE UNITED STATES OF AMERICA AMENDMENT VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

CONSTITUTION OF THE UNITED STATES OF AMERICA AMENDMENT XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

* * *

TITLE 28
JUDICIARY AND JUDICIAL PROCEDURE
PART VI—PARTICULAR PROCEEDINGS
CHAPTER 153—HABEAS CORPUS

§ 2244. Finality of determination

(a) No circuit or district judge shall be required to entertain an application for a writ of habeas corpus to inquire into the detention of a person pursuant to a judgment of a court of the United States if it appears that the legality of such detention has been determined by a judge or court of the United States on a prior application for a writ of habeas corpus, except as provided in section 2255.

(b)

(1) A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed.

(2) A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless—

(A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(B)

(i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and

(ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

(3)

(A) Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application.

(B) A motion in the court of appeals for an order authorizing the district court to consider a second or successive application shall be determined by a three-judge panel of the court of appeals.

(C) The court of appeals may authorize the filing of a second or successive application only if it determines that the application makes a prima facie showing that the application satisfies the requirements of this subsection.

(D) The court of appeals shall grant or deny the authorization to file a second or successive application not later than 30 days after the filing of the motion.

(E) The grant or denial of an authorization by a court of appeals to file a second or successive application shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari.

(4) A district court shall dismiss any claim presented in a second or successive application that the court of appeals has authorized to be filed unless the applicant shows that the claim satisfies the requirements of this section.

(c) In a habeas corpus proceeding brought in behalf of a person in custody pursuant to the judgment of a State court, a prior judgment of the Supreme Court of the United States on an appeal or review by a writ of certiorari at the instance of the prisoner of the decision of such State court, shall be conclusive as to all issues of fact or law with respect to an asserted denial of a Federal right which constitutes ground for discharge in a habeas corpus proceeding, actually adjudicated by the Supreme Court therein, unless the applicant for the writ of habeas corpus shall plead and the court shall find the existence of a material and controlling fact which did not appear in the record of the proceeding in the Supreme Court and the court shall further find that the applicant for the writ of habeas corpus could not have caused such fact to appear in such record by the exercise of reasonable diligence.

(d)

(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of—

(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

(B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;

(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

(2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

TITLE 28
JUDICIARY AND JUDICIAL PROCEDURE
PART VI—PARTICULAR PROCEEDINGS
CHAPTER 153—HABEAS CORPUS

§ 2253. Appeal

* * *

(c)

(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from—

(A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or

(B) the final order in a proceeding under section 2255.

(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

(3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

TITLE 28
JUDICIARY AND JUDICIAL PROCEDURE
PART VI—PARTICULAR PROCEEDINGS
CHAPTER 153—HABEAS CORPUS

§ 2254. State custody; remedies in Federal courts

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(b)

(1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that—

(A) the applicant has exhausted the remedies available in the courts of the State; or

(B)

(i) there is an absence of available State corrective process; or

(ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

(2) An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.

(3) A State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

(e)

(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting

the presumption of correctness by clear and convincing evidence.

(2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that—

(A) the claim relies on—

(i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and

(B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

* * *

FEDERAL RULES OF APPELLATE PROCEDURE
TITLE II. APPEAL FROM A JUDGMENT OR ORDER OF A DISTRICT COURT

Rule 3. Appeal as of Right—How Taken

(a) Filing the Notice of Appeal.

(1) An appeal permitted by law as of right from a district court to a court of appeals may be taken only by filing a notice of appeal with the district clerk within the time allowed by Rule 4. At the time of filing, the appellant must furnish the clerk with enough copies of the notice to enable the clerk to comply with Rule 3(d).

* * *

FEDERAL RULES OF APPELLATE PROCEDURE
TITLE II. APPEAL FROM A JUDGMENT OR ORDER OF A DISTRICT COURT

Rule 4. Appeal as of Right—When Taken

(a) Appeal in a Civil Case.

(1) Time for Filing a Notice of Appeal.

(A) In a civil case, except as provided in Rules 4(a)(1)(B), 4(a)(4), and 4(c), the notice of appeal required by Rule 3 must be filed with the district clerk within 30 days after entry of the judgment or order appealed from.

* * *

(3) Multiple Appeals. If one party timely files a notice of appeal, any other party may file a notice of appeal within 14 days after the date when the first notice was filed, or within the time otherwise prescribed by this Rule 4(a), whichever period ends later.

* * *

(c) Appeal by an Inmate Confined in an Institution.

(1) If an inmate confined in an institution files a notice of appeal in either a civil or a criminal case, the notice is timely if it is deposited in the institution's internal mail system on or before the last day for filing. If an institution has a system designed for legal mail, the inmate must use that system to receive the benefit of this rule.

Timely filing may be shown by a declaration in compliance with 28 U.S.C. § 1746 or by a notarized statement, either of which must set forth the date of deposit and state that first-class postage has been prepaid.

(2) If an inmate files the first notice of appeal in a civil case under this Rule 4(c), the 14-day period provided in Rule 4(a)(3) for another party to file a notice of appeal runs from the date when the district court dockets the first notice.

(3) When a defendant in a criminal case files a notice of appeal under this Rule 4(c), the 30-day period for the government to file its notice of appeal runs from the entry of the judgment or order appealed from or from the district court's docketing of the defendant's notice of appeal, whichever is later.

UNITED STATES PUBLIC LAWS
104th Congress - Second Session
PL 104-132, 110 Stat 1214
April 24, 1996
ANTITERRORISM AND EFFECTIVE DEATH PENALTY ACT OF 1996

* * *

SEC. 103. AMENDMENT OF FEDERAL RULES OF APPELLATE PROCEDURE.

Rule 22 of the Federal Rules of Appellate Procedure is amended to read as follows:

> **"Rule 22. Habeas Corpus and Section 2255 Proceedings**
>
> **(a) Application for the Original Writ.** An application for a writ of habeas corpus must be made to the appropriate district court. If made to a circuit judge, the application must be transferred to the appropriate district court. If a district court denies an application made or transferred to it, renewal of the application before a circuit judge is not permitted. The applicant may, under 28 U.S.C. § 2253, appeal to the court of appeals from the district court's order denying the application.
>
> **(b) Certificate of Appealability.**
>
> (1) In a habeas corpus proceeding in which the detention complained of arises from process issued by a state court, or in a 28 U.S.C. § 2255 proceeding, the

applicant cannot take an appeal unless a circuit justice or a circuit or district judge issues a certificate of appealability under 28 U.S.C. § 2253(c). If an applicant files a notice of appeal, the district clerk must send to the court of appeals the certificate (if any) and the statement described in Rule 11(a) of the Rules Governing Proceedings Under 28 U.S.C. § 2254 or § 2255 (if any), along with the notice of appeal and the file of the district-court proceedings. If the district judge has denied the certificate, the applicant may request a circuit judge to issue it.

(2) A request addressed to the court of appeals may be considered by a circuit judge or judges, as the court prescribes. If no express request for a certificate is filed, the notice of appeal constitutes a request addressed to the judges of the court of appeals.

(3) A certificate of appealability is not required when a state or its representative or the United States or its representative appeals."

* * *

RULES GOVERNING SECTION 2254 CASES IN THE UNITED STATES DISTRICT COURTS

Rule 11. Certificate of Appealability; Time to Appeal

(a) Certificate of Appealability. The district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant. Before entering the final order, the court may direct the parties to submit arguments on whether a certificate should issue. If the court issues a certificate, the court must state the specific issue or issues that satisfy the showing required by 28 U.S.C. § 2253(c)(2). If the court denies a certificate, the parties may not appeal the denial but may seek a certificate from the court of appeals under Federal Rule of Appellate Procedure 22. A motion to reconsider a denial does not extend the time to appeal.

(b) Time to Appeal. Federal Rule of Appellate Procedure 4(a) governs the time to appeal an order entered under these rules. A timely notice of appeal must be filed even if the district court issues a certificate of appealability.

UNITED STATES DISTRICT COURT EASTERN DISTRICT OF NORTH CAROLINA WESTERN DIVISION

THOMAS MOORE, JR.,
Petitioner,

v.

Judgment in a Civil Case

ALVIN W. KELLER and MICHAEL HARDEE,
Respondent.

Case Number: 5:11-HC-2148-F

Decision by Court.

This action came before the Honorable James C. Fox, Senior United States District Judge, for consideration of the respondent's motion for summary judgment and the petitioner's cross motion for summary judgment.

IT IS ORDERED AND ADJUDGED that respondent's motion for summary judgment is granted in part and denied in part and petitioner's cross motion for summary judgment is granted in part and denied in part. A writ of habeas corpus vacating petitioner's conviction shall issue, and the State of North Carolina shall release petitioner from its custody unless, within 180 days from the date of this order, the State initiates a new trial against petitioner.

This Judgment Filed and Entered on March 30, 2012, with service on:

Laura Grimaldi and Clarence J. DelForge, III (via CM/ECF Notice of Electronic Filing)

March 30, 2012

/s/ Julie A. Richards
Clerk

Raleigh, North Carolina

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CHOI CHUN LAM v. DONALD KELCHNER, SUPERINTENDENT	Criminal No. No. 98-3109

ORDER

AND NOW, this 20 day of October, 2000, after review of the Report and Recommendation of United States Magistrate Judge Jacob P. Hart, IT IS ORDERED that:

1. The Report and Recommendation is APPROVED and ADOPTED.

2. The petition for a writ of habeas corpus is GRANTED. It is directed that petitioner's 1995 conviction and her subsequent sentence be and hereby are set aside.

3. It is further ORDERED that no later than sixty days from the date of this Order, petitioner Choi Chun Lam is to be released from custody unless, within that period of sixty days, the Commonwealth of Pennsylvania commences a retrial of petitioner. At such a retrial, the following evidence must be excluded: evidence of Lam's statements to the undercover agents who visited her disguised gang

members, and evidence of Xie's statements to those same agents when they were still posing as gang members, subsequent to the agents' contact with Lam.

3 [*] There is basis for the issuance of a certificate of appealability.

BY THE COURT:

/s/ Louis H. Pollak
Louis H. Pollak

COPIES BY MAIL: /s/ 10-23-00
TO: /s/ Kenneff Sosnov
/s/ Mag Hart

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[*] So in the original.

REPLY BRIEF

American Bar Association
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No. 13-7211

IN THE

Supreme Court of the United States

ROBERT MITCHELL JENNINGS,
Petitioner,

v.

WILLIAM STEPHENS, DIRECTOR,
TEXAS DEPARTMENT OF CRIMINAL JUSTICE,
CORRECTIONAL INSTITUTIONS DIVISION,
Respondent.

On Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

PETITIONER'S REPLY BRIEF

JEFFREY T. GREEN
ERIKA L. MALEY
PAUL J. SAMPSON
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000
jgreen@sidley.com

RANDOLPH L. SCHAFFER, JR.
Counsel of Record
1301 McKinney, Ste. 3100
Houston, Texas 77010
(713) 951-9555
noguilt@swbell.net

Counsel for Petitioner

September 11, 2014

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
REPLY BRIEF	1
I. A PREVAILING HABEAS PETITIONER NEED NOT CROSS-APPEAL OR OBTAIN A CERTIFICATE OF APPEALABILITY TO RAISE AN ALTERNATIVE GROUND FOR AFFIRMANCE	2
A. Section 2253(c) Does Not Require An Appellee To Obtain A Certificate Of Appealability To Raise A Rejected Allegation Of Deficient Performance In Support Of An Ineffective Assistance Of Counsel Claim	2
B. A Prevailing Party Need Not File A Cross-Appeal To Raise An Alternative Argument For Affirming The Judgment	7
II. A HABEAS PETITIONER WHO PREVAILED IN THE DISTRICT COURT ON A SINGLE INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM NEED NOT OBTAIN A CERTIFICATE OF APPEALABILITY TO RAISE AN ALLEGATION OF DEFICIENT PERFORMANCE THAT THE DISTRICT COURT REJECTED	17
CONCLUSION	22

TABLE OF AUTHORITIES

Page(s)

CASES

Alexander v. *Coeden Pipe Line Co.*, 290 U.S. 484 (1934) 13, 14
Am. Elec. Power Co. v. *Connecticut*, 131 S.Ct. 2527 (2011) 7
Aparicio v. *Artuz*, 269 F.3d 78 (2d Cir. 2001) 4
Arlinghaus v. *Ritenour*, 622 F.2d 629 (2d Cir. 1980) 14
Ball v. *Rodgers*, 492 F.3d 1094 (9th Cir. 2007) 11
Barry v. *Brower*, 864 F.2d 294 (3d Cir. 1988) 9
Berkemer v. *McCarty*, 468 U.S. 420 (1984) 11
Blum v. *Bacon*, 457 U.S. 132 (1982) 13
Carcieri v. *Salazar*, 555 U.S. 379 (2009) 3
Cardenas v. *Thaler*, 651 F.3d 442 (5th Cir. 2011) 21
El Paso Natural Gas Co. v. *Neztsosie*, 526 U.S. 473 (1999) 7
Fisher v. *Angelone*, 163 F.3d 835 (4th Cir. 1998) 19
Gonzalez v. *Crosby*, 545 U.S. 524 (2005) 18
Gonzalez v. *Thaler*, 132 S.Ct. 641 (2012) 3, 6
Haitian Refugee Ctr., Inc. v. *Baker*, 949 F.2d 1109 (11th Cir. 1991) (per curiam) .. 11
Helvering v. *Pfeiffer*, 302 U.S. 247 (1937) 13, 14
High Tech Med. Instr., Inc. v. *New Image Indus., Inc.*, 49 F.3d 1551 (Fed. Cir. 1995) 11
Int'l Ore & Fertilizer Corp. v. *SGS Control Servs., Inc.*, 38 F.3d 1279 (2d Cir. 1994) .. 15

TABLE OF AUTHORITIES—continued

Page(s)

Jones v. *Stotts*, 59 F.3d 143 (10th Cir. 1995) 19
Lamie v. *U.S. Trustee*, 540 U.S. 526 (2004) 3
Lazare Kaplan Int'l, Inc. v. *Photoscribe Techs., Inc.*, 714 F.3d 1289 (Fed. Cir. 2013) 12
Magwood v. *Patterson*, 561 U.S. 320 (2010) 9
Mississippi ex rel. Hood v. *AU Optronics Corp.*, 134 S.Ct. 736 (2014) 17
Morley Const. Co. v. *Md. Cas. Co.*, 300 U.S. 185 (1937) 11, 16
North Carolina v. *Pearce*, 395 U.S. 711 (1969), *overruled on other grounds by Alabama* v. *Smith*, 490 U.S. 794 (1989) ... 9
Peoples v. *United States*, 403 F.3d 844 (7th Cir. 2005) 18, 20
Peterson v. *Douma*, 751 F.3d 524 (7th Cir. 2014) 6
Rhines v. *Weber*, 544 U.S. 269 (2005) 19
Roe v. *Flores-Ortega*, 528 U.S. 470 (2000) ... 18
Schweiker v. *Hogan*, 457 U.S. 569 (1982) ... 13
Strickland v. *Washington*, 466 U.S. 668 (1984) 8
Subway Equip. Leasing Corp. v. *Sims*, 994 F.2d 210 (5th Cir. 1993) 16
Szabo v. *Walls*, 313 F.3d 392 (7th Cir. 2002) 2, 3, 4
Tolbert v. *Queens Coll.*, 242 F.3d 58 (2d Cir. 2001) 4
Trevino v. *Thaler*, 133 S.Ct. 1911 (2013) 19

TABLE OF AUTHORITIES—continued

Page(s)

Union Pac. R.R. Co. v. *Bhd. of Locomotive Eng'rs & Trainmen*, 558 U.S. 67 (2009) 13
United States v. *Am. Ry. Express Co.*, 265 U.S. 425 (1924) 7, 11, 12, 13
United States v. *Bohn*, 959 F.2d 389 (2d Cir. 1992) 14
United States v. *Galloway*, 56 F.3d 1239 (10th Cir. 1995) (en banc) 18, 20
United States v. *Harvey*, 2 F.3d 1318 (3d Cir. 1993) 14
United States v. *Locke*, 471 U.S. 84 (1985) .. 3
United States v. *Stinson*, 97 F.3d 466 (11th Cir. 1996) (per curiam) 9

STATUTES, RULES, AND CODE

28 U.S.C. § 2253 ..... 1, 2, 5
Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 ..... 5, 7
Fed. R. App. P. 22 ..... 5, 6
Fed. R. App. P. 32(a)(7) 4
Tex. Code Crim. Proc. Ann. art. 37.071 (West 2013) 21

OTHER AUTHORITIES

Brian R. Means, *Federal Habeas Manual* (2014) 10
Charles Alan Wright et al., *Federal Practice and Procedure* (Supp. 2014) 12, 14, 16, 17
James Moore, *Moore's Federal Practice* (2d ed. 1996) 16

TABLE OF AUTHORITIES—continued

Page(s)

James Moore, *Moore's Federal Practice* (3d ed. 2014) 15

Robert L. Stern, Comments, *When to Cross-Appeal or Cross-Petition—Certainty or Confusion?*, 87 Harv. L. Rev. 763 (1974) 16

REPLY BRIEF

28 U.S.C. § 2253 does not require a habeas petitioner who is an appellee to obtain a certificate of appealability (COA); rather, the statute plainly provides that a COA is required for "an appeal" to "be taken" by the applicant for the writ. Respondent urges this Court to disregard the plain text of the statute on policy grounds, as well as what is supposedly good for habeas petitioners, but an interpretation that is contrary to the statutory text cannot stand. Respondent's policy arguments also are exaggerated; a prevailing habeas petitioner's strong incentive to protect the judgment in his favor, coupled with the page limitations imposed by the Federal Rules of Appellate Procedure, will easily prevent appellate courts from being overwhelmed with frivolous alternative arguments.

Petitioner did not need to appeal, and hence did not need a COA, to raise an alternative argument for affirming the district court's judgment in his favor. Respondent's arguments to the contrary are based upon a fundamental misunderstanding of the cross-appeal rule. A cross-appeal is required only for a claim that would expand the appellee's rights under the judgment or lessen the rights of his adversary. A cross-appeal is not required for the appellee to advance a different legal basis for the relief already granted. The cases respondent cites serve only to illustrate this long-standing and firmly established principle. Here, the district court's judgment granted petitioner a new sentencing hearing, and the additional argument he sought to raise would in no way have expanded his rights or lessened respondent's rights under that judgment. No cross-appeal and no COA were required.

Further, even if, as respondent contends, a cross-appeal could be required to raise a claim rejected below, petitioner did not need to cross-appeal or obtain a COA here because he did not seek to raise a separate claim, but rather to raise an additional argument in support of the ineffective assistance of counsel (IAC) claim on which he prevailed in the district court.

I. A PREVAILING HABEAS PETITIONER NEED NOT CROSS-APPEAL OR OBTAIN A CERTIFICATE OF APPEALABILITY TO RAISE AN ALTERNATIVE GROUND FOR AFFIRMANCE.

A. Section 2253(c) Does Not Require An Appellee To Obtain A Certificate Of Appealability To Raise A Rejected Allegation Of Deficient Performance In Support Of An Ineffective Assistance Of Counsel Claim.

The statutory text of 28 U.S.C. § 2253 plainly does not require an appellee to obtain a certificate of appealability. The section, entitled "appeal," states that, "[u]nless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals." 28 U.S.C. § 2253(c)(1). The appellee does not "take[]" "an appeal," and therefore need not obtain a certificate of appealability. *See Szabo v. Walls*, 313 F.3d 392, 397 (7th Cir. 2002) ("[T]he statute deals only with *appeals* by prisoners; it does not mention arguments by prisoners *as appellees* offered in support of relief they have obtained.").

Respondent offers no other way to read this clear statutory text. Instead, respondent urges the Court to infer a COA requirement for all appellees from the "context" of the statute, Resp't Br. 45, contending

that such a requirement is necessary to "avoid[] the waste of judicial resources in a futile review of clearly meritless claims." *Id.* at 46 (internal quotation marks and citation omitted). This contention cannot justify ignoring the statutory text. Where, as here, the statutory text "speaks for itself," such "policy views" and inferences from a supposed congressional "purpose" have no force. *Carcieri* v. *Salazar*, 555 U.S. 379, 392 (2009); *see Lamie* v. *U.S. Trustee*, 540 U.S. 526, 534 (2004). Here, "the plain language of the statute simply cannot sustain the gloss [respondent] would put on it," and respondent's interpretation must be rejected. *United States* v. *Locke*, 471 U.S. 84, 93 (1985).

Moreover, respondent's policy arguments miss the mark. The purpose of the COA provision is to prevent the needless delay and waste of judicial resources caused by habeas petitioners taking frivolous appeals which, given the large number of petitions denied, represent a considerable risk of overwhelming the courts. *Gonzalez* v. *Thaler*, 132 S.Ct. 641, 650 (2012). But when a habeas petitioner prevails below, and the *state* appeals, the situation is quite different. Because the state has appealed, the court of appeals must hear the case; once "resources are deployed in briefing and argument," the burden of considering additional arguments is relatively slight, and any benefit of "additional screening" of the issues "would not outweigh the costs of further delay from the extra layer of review." *Gonzalez*, 132 S.Ct. at 650; *Szabo*, 313 F.3d at 398.

Further, respondent's contention that habeas petitioners who are appellees will overwhelm appellate courts with frivolous alternative arguments is unrealistic. Habeas petitioners who did not prevail in the district court may have an incentive—particularly strong in capital cases—to raise "all conceivable er-

rors" in the hope of obtaining relief on one. Resp't Br. 48. A *prevailing* habeas petitioner, however, has nothing to gain and much to lose from pursuing such a strategy; his overwhelming incentive is to protect the judgment already granted in his favor. This incentive makes it highly unlikely that a prevailing habeas petitioner will raise frivolous claims rather than focusing on defending the district court's decision on his meritorious claim or claims.

Respondent and *amicus* invoke the specter of a prevailing habeas petitioner raising "over 100 claims" on appeal, but tellingly cite only a state court case where the habeas petitioner had *not* prevailed below. Resp't Br. 43; Brief *Amicus Curiae* of the Criminal Justice Legal Foundation 9, 11. Neither respondent nor *amicus* were able to offer this Court *any* instance of a prevailing habeas petitioner seeking to raise an unreasonable number of alternative arguments as a federal appellee. This case offers a far more realistic picture: petitioner prevailed in the district court on two arguments in support of his IAC claim and sought to raise only *one* additional argument in support of that claim as appellee. J.A.65-68; *see Szabo*, 313 F.3d at 397 (similar). In any event, a habeas petitioner who sought to raise 100 additional claims in the 14,000 words permitted for an appellee brief would likely find those claims waived. Fed. R. App. P. 32(a)(7); *Tolbert* v. *Queens Coll.*, 242 F.3d 58, 75 (2d Cir. 2001) ("It is a settled appellate rule that issues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived." (internal quotation marks and citation omitted)). Nor is an appellate court obligated to address every claim raised by a party. *See, e.g.*, *Aparicio* v. *Artus*, 269 F.3d 78, 100 (2d Cir. 2001) (rejecting claims by stating only, "[w]e have considered

all the parties' remaining contentions and find them to be without merit").

Respondent offers two additional arguments for ignoring the statutory text, but neither has merit. First, respondent argues that the Court should disregard § 2253(c)(1)'s text because "read rigidly" it would require *states* to obtain COAs, an interpretation courts have rejected. Resp't Br. 45. However, interpreting § 2253(c)(1) not to apply to states is fully consistent with its text. Section 2253(c)(2), governing when a COA "may issue under paragraph (1)," provides a strong textual indication that paragraph (1) does not apply to states. Section 2253(c)(2) provides that "[a] certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right." It thus specifies that the habeas "applicant" is the party who must obtain a COA, and it sets forth a standard—"a substantial showing of the denial of a constitutional right"—that only applicants, not states, can meet. *Id.* Additionally, "the legislative history strongly suggests that the intention of Congress was to require a certificate only in the case in which an appeal is taken by an applicant for the writ." Fed. R. App. P. 22 advisory comm.'s note. Finally, Congress clarified that the COA requirement does not apply to states by amending Rule 22 to provide that "*the applicant* cannot take an appeal unless a circuit justice or district judge issues a certificate of appealability." Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, § 103, 110 Stat. 1214, 1218.

By contrast, respondent cannot and does not point to any textual indication that an appellee must obtain a COA, nor to any legislative history or federal rule supporting that interpretation. The text of the

statute addresses only appellants, stating that an "appeal may not be taken" without a COA, and Rule 22 likewise states that "the applicant *cannot take an appeal*" without a COA. That the COA requirement does not apply to states provides no basis to apply it to appellees.

Second, respondent asserts that "Section 2253(c)(3)'s reference to 'specific issue or issues' indicates that the statute is not concerned with *appeals* . . . but rather with the *issues* [habeas petitioners] present on appeal." Resp't Br. 46. This argument is contrary to *Gonzalez*, where this Court drew a sharp distinction between §§ 2253(c)(1) and (c)(3). The state argued in *Gonzalez* that § 2253(c)(1) should be interpreted as meaning that, "[u]nless a circuit justice or judge issues a certificate of appealability *that shall indicate the specific issue or issues that satisfy the showing required by paragraph (3)*, an appeal may not be taken." 132 S.Ct. at 651 (internal quotation marks omitted). The Court rejected that argument, holding that "the statute provides no such thing." *Id.* Thus, (c)(3)'s requirement that judges specify issues in a COA does not address whether a COA is required. That subject is governed by (c)(1), which "establish[es] that 'until a COA has been issued federal courts of appeals lack jurisdiction to rule on the merits of *appeals from habeas petitioners*.'" *Id.* at 649 (emphasis added) (quoting *Miller-El* v. *Cockrell*, 537 U.S. 322, 336 (2003)). The Seventh Circuit's opinion in *Peterson*, upon which respondent relies (Resp't Br. 6, 48), only serves to highlight that when a habeas petitioner seeks to appeal, and a COA is granted, district courts can certify separate "theories" or "issues" within IAC (or any other type of claim) with precision. *Peterson* v. *Douma*, 751 F.3d 524, 529 n.1 (7th Cir. 2014). But when a state ap-

peals, it runs the risk that *all* appealing parties do—that the judgment might be affirmed on an alternative argument.

Finally, respondent suggests that, if requiring an appellee to obtain a COA is contrary to the statutory text, the Court should impose the requirement anyway "as a matter of federal common law." Resp't Br. 46. But "it is primarily the office of Congress, not the federal courts, to prescribe national policy." *Am. Elec. Power Co.* v. *Connecticut*, 131 S.Ct. 2527, 2537 (2011). And Congress has not been inactive with respect to prescribing policy in the habeas context. *See* AEDPA, Pub. L. No. 104-132, 110 Stat 1214. Accordingly, where, as here, a "statute speaks directly to the question at issue," the "congressional legislation excludes the declaration of federal common law." *Am. Elec. Power*, 131 S.Ct. at 2537 (internal quotation marks omitted).

B. A Prevailing Party Need Not File A Cross-Appeal To Raise An Alternative Argument For Affirming The Judgment.

Respondent alternatively contends that petitioner "was required to cross-appeal" to raise his additional argument and, therefore, needed a COA. Resp't Br. 7. This contention relies upon a fundamental misunderstanding of the cross-appeal rule and would result in a multiplicity of unnecessary cross-appeals. Petitioner *prevailed* in the district court and obtained all the relief he requested. The alternative argument he sought to raise would neither have "enlarg[ed] his own rights" under the judgment nor "lessen[ed] the rights of his adversary," and therefore no cross-appeal was necessary. *United States* v. *Am. Ry. Express Co.*, 265 U.S. 425, 435 (1924); *El Paso Natural Gas Co.* v. *Neztsosie*, 526 U.S. 473, 479 (1999).

1. Respondent contends that petitioner had, in fact, "sought additional relief" and "sought to enlarge his rights," Resp't Br. 7-8, because "he asked the Fifth Circuit to award him a federal habeas remedy for his *Spisak* claim, in addition to the federal habeas remedies he already had won for his *Wiggins* claims," and that prevailing on that ground would have enlarged his rights because it would have effectively "order[ed] the State to fix th[e] alleged [*Spisak*] error as well."[1] Resp't Br. 7. However, the judgment does not order respondent to "fix" a particular "error"; rather, the judgment orders that "Thaler shall release Jennings from custody unless, within 120 days, the State of Texas grants Jennings a new sentencing hearing or resentences him to a term of imprisonment." J.A.35.

Respondent contends that this is simply a matter of phrasing, and the judgment should be interpreted as though it ordered respondent to "conduct a new sentencing hearing free of the *Wiggins* errors." Resp't Br. 13. That is not an accurate interpretation of the judgment or of its practical impact upon the parties. The errors were committed by defense counsel, and raise no question, for example, about what evidence respondent could introduce on remand. More fundamentally, just as its plain language states, the judgment orders that petitioner be given "a new sentencing hearing" (or be resentenced to a term of imprisonment rather than death). J.A.35. This order results in the "*invalidation* (in whole or in part) *of the judgment* authorizing the prisoner's confinement,"

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[1] Respondent incorrectly characterizes petitioner's three allegations of deficient performance as the "*Wiggins* claims" and the "*Spisak* claim." The three arguments supported a single claim of IAC, based on *Strickland* v. *Washington*, 466 U.S. 668 (1984). *See infra* 18-20. However, solely for ease of reference, this reply brief at times uses respondent's terminology.

and requires the state to obtain "a *new* judgment (through a new trial or a new sentencing proceeding)." *Magwood* v. *Patterson*, 561 U.S. 320, 332 (2010) (quoting *Wilkinson* v. *Dotson*, 544 U.S. 74, 83 (2005)). In other words, the order results in the state judgment being "wholly nullified and the slate wiped clean." *North Carolina* v. *Pearce*, 395 U.S. 711, 721 (1969), *overruled on other grounds by Alabama* v. *Smith*, 490 U.S. 794 (1989); *see United States* v. *Stinson*, 97 F.3d 466, 469 (11th Cir. 1996) ("when a criminal sentence is vacated, it becomes void in its entirety") (per curiam). Therefore, the judgment entitled petitioner to an entirely new sentencing hearing.

For example, consider a hypothetical case where a habeas petitioner raises an equal protection claim under *Batson* v. *Kentucky*, 476 U.S. 79 (1986), and an IAC claim under *Strickland*; the district court accepts one, rejects the other, and orders a new trial. It would make no difference to the parties whether the district court granted relief based on *Batson* or *Strickland*. Either way, the relief would be the same: a new trial. In the new trial, the defendant would have the right to *both* a jury selection that was not racially discriminatory *and* the effective assistance of counsel. Similarly here, the relief ordered was a new sentencing hearing. J.A.35. At the new sentencing hearing, petitioner would have a right to the effective assistance of counsel, not merely to counsel who refrained from making the precise mistakes identified by the district court. Indeed, the district court could not order defense counsel to pursue a particular strategy or to make (or refrain from making) a particular argument. *See Barry* v. *Brower*, 864 F.2d 294, 300 (3d Cir. 1988) ("Both the historic nature of the writ and principles of federalism preclude a federal court's direct interference with a state court's conduct

of state litigation."); Brian R. Means, *Federal Habeas Manual* § 13:15 (2014) (same). Therefore, even if the district court had ruled in petitioner's favor on the so-called "*Spisak*" argument, it would have had no impact upon the judgment already granted on the basis of the so-called "*Wiggins*" arguments.

Of course, in some instances, changing the legal basis for a judgment will require a change to the judgment. For example, suppose the court sustained a punishment phase IAC claim, but rejected a guilt-innocence phase claim. A habeas petitioner who sought to raise the rejected guilt-innocence phase claim would need to cross-appeal, because the claim, if sustained, would entitle him to additional relief (a new trial rather than a new sentencing hearing). In short, the denial of a claim requires a cross-appeal if that claim would entitle the appellee to additional relief beyond that ordered by the district court's judgment.

Moreover, a cross-appeal is necessary to raise a claim that would impact the parties' rights under the judgment, even if the actual wording of the judgment would not change. As respondent observes, "equally significant practical effects can flow from findings that are not [explicitly] incorporated in a decree." Resp't Br. 14, (quoting 15A Charles Alan Wright et al., *Federal Practice and Procedure* § 3902 (Supp. 2014) ["Wright & Miller"]). Respondent gives an example of a habeas petitioner who is granted relief on an IAC claim but denied relief on a coerced confession claim. Resp't Br. 9. Although the relief requested on both claims may be a new trial, respondent observes, the denial of the coerced confession claim may have a practical negative impact upon the petitioner, as it could lead to the confession again being admitted at the new trial. *Id.* 9-11. Assuming that a ruling on

the coerced confession claim would have this impact, a cross-appeal could be prudent where the law is unsettled. *Am. Ry. Express Co.*, 265 U.S. at 435; *see Berkemer* v. *McCarty*, 468 U.S. 420, 435 n.23 (1984) (noting that cross-petition might be necessary to raise argument that could lead to exclusion of additional evidence).

However, there is no need to determine in this case whether a claim relating to the admissibility of evidence requires a cross-appeal. Indeed, respondent's example merely illustrates why a cross-appeal is *not* required here: the additional argument petitioner sought to raise would not change either the wording of the judgment or its practical impact on the parties. The judgment entitled petitioner to a new sentencing hearing. Respondent identifies no practical impact upon either party from changing the basis of the judgment from a "*Wiggins*" to a "*Spisak*" error. Accordingly, no cross-appeal was necessary.

The other cases respondent cites embody the same point: a cross-appeal is necessary to raise a claim that would change the parties' rights under the judgment. In *Morley Const. Co.* v. *Md. Cas. Co.*, 300 U.S. 185 (1937), a cross-appeal was required to raise a claim for specific performance of a contract where the decree below had ordered exoneration of the contract because, among other things, substituting specific performance for exoneration would change who "would control the distribution of the fund." *Id.* at 192; *see also Ball* v. *Rodgers*, 492 F.3d 1094, 1119 (9th Cir. 2007) (refusing to consider claims without cross-appeal where "the terms of the injunction would certainly have to be modified"); *High Tech Med. Instr., Inc.* v. *New Image Indus., Inc.*, 49 F.3d 1551, 1558 (Fed. Cir. 1995) (cross-appeal required where "relief . . . would be different"); *Haitian Refugee Ctr.*,

Inc. v. *Baker*, 949 F.2d 1109, 1111 (11th Cir. 1991) (per curiam) (cross-appeal required to raise First Amendment claim that could not support relief granted by injunction); *Lasare Kaplan Int'l, Inc.* v. *Photoscribe Techs., Inc.*, 714 F.3d 1288, 1295 (Fed. Cir. 2013) (cross-appeal required to raise argument that patent was invalid where district court held that it was not infringed because holding that it was invalid would lessen patentee's rights). Petitioner was not "attack[ing] the decree with a view either to enlarging his own rights thereunder or of lessening the rights of his adversary" and, therefore, no cross-appeal was required. *Am. Ry. Express Co.*, 265 U.S. at 435; *see* Wright & Miller, *supra*, § 3904.

2. Respondent next argues that, even where the appellee is not seeking to change the parties' rights under the judgment, he "must cross-appeal to change the disposition of a claim," Resp't Br. 23, defining a "claim" as "an asserted federal basis for relief." *Id.* at 28. But the opinion in *American Railway* forecloses that argument entirely in explaining that a cross-appeal is not required to "urge in support of a decree any matter appearing in the record, although [the appellee's] argument may involve an attack upon the reasoning of the lower court or an insistence upon matter overlooked or ignored by it." 265 U.S. at 435; Wright & Miller, *supra*, § 3904 ("The classic statement of basic cross-appeal doctrine is provided by the opinion of Justice Brandeis in *United States* v. *American Railway Express Company* . . . .").

Indeed, if respondent's proposed cross-appeal rule were correct, *American Railway* itself would have been wrongly decided. The appellee there prevailed below on an argument that it was not a "carrier by railroad" within the meaning of the applicable statute. *Am. Ry. Express Co.*, 265 U.S at 427. On appeal,

the appellee sought to raise two additional statutory claims and a "further claim" that the order was an unconstitutional taking under the Fifth Amendment. *Id.* at 434-35. Although these distinct "claims" raised different "federal bas[es] for relief," Resp't Br. 23, 28, the Court held that no cross-appeal was necessary because the appellee "does not attack, in any respect, the decree entered below." *Am. Ry. Express Co.*, 265 U.S. at 435-36.

Respondent's claim-based cross-appeal rule also is contrary to other decisions of this Court. For instance, in *Blum* v. *Bacon*, 457 U.S. 132 (1982), the court of appeals enjoined a state law on the ground that it violated the Equal Protection Clause. *Id.* at 137. This Court upheld the judgment based on a separate claim that the state law conflicted with valid federal regulations. *Id.* at 138. It held that no "cross-appeal or cross-petition" was required to raise the preemption claim, rejecting what it characterized as the "novel view that an affirmance which does not alter the relief ordered in the judgment below 'modifies' the judgment simply because the affirmance rests on a different legal basis than the court below adopted." *Id.* at 138 n.5; *see Schweiker* v. *Hogan*, 457 U.S. 569, 585 (1982) (without cross-petition, respondent may defend judgment based on statutory claim when lower court granted relief on constitutional claim); *Union Pacific R.R. Co.* v. *Bhd. of Locomotive Eng'rs & Trainmen*, 558 U.S. 67, 80 (2009) (same).

Respondent contends that *Helvering* v. *Pfeiffer*, 302 U.S. 247 (1937), and *Alexander* v. *Cosden Pipe Line Co.*, 290 U.S. 484 (1934), establish that a cross-appeal is needed to change the disposition of a claim. Neither case does so. Instead, as the Second Circuit has explained, both cases involve the question "[w]hether a cross-appeal is required where an appellee wishes a

component of the judgment increased only in the event that another component is decreased on appeal." *United States* v. *Bohn*, 969 F.2d 389, 392 (2d Cir. 1992).

Pfeiffer and *Alexander* involved separate assessments for different amounts of tax. The appellees sought to raise alternative arguments that the lower courts had improperly rejected or reduced certain assessments in the event that the Court overturned the judgment in their favor on other assessments. These alternative arguments logically would have required a change in the judgment. Had the Court accepted both the lower court's reasoning and the alternative arguments, the appellees would have logically been entitled to a greater recovery. In addition, because the different claims involved assessments for different amounts of tax, a substitution of the alternative argument for the argument accepted by the lower court also would have required different relief. The Court held that such arguments require a cross-appeal. *Bohn*, 969 F.2d at 392; *Pfeiffer*, 302 U.S. at 250-51; *Alexander*, 290 U.S. at 487. Thus, *Pfeiffer* and *Alexander* stand, at most, for the principle that a cross-appeal is needed "when arguments are made that can be limited to support of the judgment but that logically would require modification." Wright & Miller, *supra*, § 3904.[3]

Even this principle has been criticized and, at best, inconsistently followed. *See id.*; *United States* v. *Harvey*, 2 F.3d 1318, 1326 (3d Cir. 1993) (no cross-

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[3] *Arlinghaus* v. *Ritenour*, 622 F.2d 629 (2d Cir. 1980), which respondent contends "correctly appl[ies] ... the *Pfeiffer-Alexander* doctrine," Resp't Br. 28, cites neither case and does not hold that a cross-appeal is required to change the disposition of a claim. *Arlinghaus*, 622 F.2d at 638.

appeal was needed "to permit us to entertain a Government request to augment one component of a [criminal] sentence . . . in response to an appellate ruling decreasing another component of the sentence" (quoting *Bohn*, 959 F.2d at 393-94)); *Int'l Ore & Fertilizer Corp.* v. *SGS Control Servs., Inc.*, 38 F.3d 1279, 1286 (2d Cir. 1994) (judgment granted on negligent misrepresentation claim may be affirmed on breach of contract claim, "but we may not enlarge [the judgment] to award [appellee] its full contract damages").

However, there is no need to consider the issue here. Petitioner did not seek to advance an argument that logically would have required a modification of the judgment. Respondent's attempts to distinguish "*Wiggins* errors" from a "*Spisak* error" amount to an unwarranted recharacterization of the judgment that: "Thaler shall release Jennings from custody unless, within 120 days, the State of Texas grants Jennings a new sentencing hearing or resentences him to a term of imprisonment." J.A.35. Because the alternative argument required no change to the judgment, no cross-appeal was needed.

Respondent also relies on a superseded treatise section; the current version omits the language that Respondent quotes. *See* James Moore, *Moore's Federal Practice* § 205.04 (3d ed. 2014) ("[I]*f* an appellee seeks to vacate, modify, or alter the rights of the parties under the judgment, it must cross-appeal or forgo review of its claim."). In any event, even the outmoded treatise section that respondent cites stands only for the same principle as *Pfeiffer* and *Alexander*: an appellee may not seek to "offset" the diminishment of one component of a judgment by enlarging another, and, therefore, an appellee awarded $10,000 cannot "support his judgment by any argument raised by the record that would entitle him to $10,000 or more."

James Moore, *Moore's Federal Practice* § 204.11 (2d ed. 1996). Finally, the law review article that respondent cites simply relies upon an even older version of the treatise, stating, "[s]ince Professor Moore's treatise elaborates on this point, little more will be said about it here," and, "this Comment is not concerned with it." Robert L. Stern, Comments, *When to Cross-Appeal or Cross-Petition—Certainty or Confusion?*, 87 Harv. L. Rev. 768, 767 (1974).

This Court should reject respondent's invitation to create a rule requiring a cross-appeal to "change the disposition of a claim," Resp't Br. 23, because it would create serious uncertainty as to when cross-appeals are required and would clog the courts with unnecessary cross-appeals. *See Subway Equip. Leasing Corp. v. Sims*, 994 F.2d 210, 214 (5th Cir. 1993) (cross-appeals are disfavored because they "disrupt[] the briefing schedule, increase[] the number (and usually the length) of briefs, and tend[] to confuse the issues."). The current cross-appeal rule is well-settled, understood by courts and litigants, and simple to apply in the vast majority of cases, "since ordinarily it is not difficult to determine whether a party is asking that the judgment be modified." Wright & Miller, *supra*, § 3904; *see Morley*, 300 U.S. at 191 (referring to the *American Railway* rule as "inveterate and certain").

Respondent's proposed claim-based approach would make the rule far more complex. Indeed, respondent concedes that it is frequently very difficult to decide what is a single "claim," and "the courts of appeals . . . are intractably divided over what constitutes 'one claim for relief.'" Resp't Br. 37 (citing *Amalgamated Meat Cutters v. Thompson Farms Co.*, 642 F.2d 1065, 1070 (7th Cir. 1981) ("[C]ourts have been completely unable to settle on a single test for

determining when claims are 'separate.'"); 10 Wright & Miller, *supra*, § 2657 ("There is no generally accepted test that is used to determine whether more than one claim for relief is before the court," and "the line between deciding one of several claims and deciding only part of a single claim is sometimes very obscure."). "[S]implicity is a virtue" in setting rules that determine whether courts may reach the merits of an argument. *Mississippi ex rel. Hood* v. *AU Optronics Corp.*, 134 S.Ct. 736, 744 (2014) (quoting *Standard Fire Ins. Co.* v. *Knowles*, 133 S.Ct. 1345, 1350 (2013)). This Court should not abandon the clear, simple rule that a cross-appeal is required to modify the judgment for the far murkier rule that a cross-appeal is required to change the disposition of a claim.

Finally, even if a cross-appeal were required to change the disposition of a claim, no cross-appeal was needed here. As explained in the next section, petitioner did not raise a separate claim but merely an additional argument in support of the IAC claim that he prevailed upon below. Respondent concedes that a cross-appeal is not required to raise additional "[c]ontentions, arguments, and theories" in support of a single claim. Resp't Br. 28.

II. A HABEAS PETITIONER WHO PREVAILED IN THE DISTRICT COURT ON A SINGLE INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM NEED NOT OBTAIN A CERTIFICATE OF APPEALABILITY TO RAISE AN ALLEGATION OF DEFICIENT PERFORMANCE THAT THE DISTRICT COURT REJECTED.

1. Assuming *arguendo* that COA is required in some circumstances when a habeas petitioner is the appellee, it was not required here. Petitioner presented one claim of ineffective assistance of counsel.

On appeal, he did not raise a new claim, but merely an alternative argument in support of the IAC claim that he prevailed upon in the district court. *See* Pet'r Br. 26-33.

Petitioner's IAC claim, which requested a new punishment hearing, was based on three allegations of deficient performance: that counsel (1) failed to investigate petitioner's mental history and discover a beneficial psychological evaluation; (2) failed to present evidence of petitioner's disadvantaged background; and (3) made an affirmatively prejudicial closing argument. Each of these allegations is firmly grounded in *Strickland*, which requires that a defendant "must show (1) that counsel's representation 'fell below an objective standard of reasonableness,' . . . and (2) that counsel's deficient performance prejudiced the defendant." *Roe* v. *Flores-Ortega*, 528 U.S. 470, 476-77 (2000) (quoting *Strickland*, 466 U.S. at 688). Thus, the three allegations of deficient performance set forth only one "asserted federal basis for relief." *Gonzalez* v. *Crosby*, 545 U.S. 524, 530 (2005).

Further, as explained in petitioner's opening brief, IAC at the punishment phase is a single claim because *Strickland* requires a court to consider the cumulative effect of each act or omission that constitutes deficient performance. If the *Strickland* Court viewed multiple allegations of deficient performance as separate claims, it would not have required a cumulative prejudice analysis. Pet'r Br. 30-31. For this reason, several courts have noted that "an ineffectiveness claim may be viewed as unitary, regardless of the number of separate reasons advanced in support of the claim." *United States* v. *Galloway*, 56 F.3d 1239, 1241 (10th Cir. 1995) (en banc); *see Peoples* v. *United States*, 403 F.3d 844, 846, 848 (7th Cir. 2005) ("[I]neffective assistance of counsel is a single ground

for relief no matter how many failings the lawyer may have displayed."). The rejected allegation of deficient performance was thus part of petitioner's IAC claim, which he prevailed upon in the district court.[3]

Respondent cites cases in which this Court has referred to a petitioner's "claims" of IAC. Resp't Br. 32. Because the technical meaning of the term "claim" was not at issue, those cases are of no consequence here. Cases involving procedural default and "total exhaustion" of state court remedies are likewise not on point. Resp't Br. 33-34. *Trevino* v. *Thaler*, 133 S.Ct. 1911 (2013), did not, as respondent suggests, consider whether IAC constitutes a single claim or multiple claims. Rather, it held that a procedurally defaulted IAC claim can be considered upon a showing of cause and prejudice. *Id.* at 1921. *Rhines* v. *Weber*, 544 U.S. 269 (2005), likewise did not consider the meaning of the term "claim" or whether IAC is a single claim. Thus, neither case is relevant to the question here: whether an appellee must obtain a COA to raise a rejected allegation of deficient performance where he receives relief on an IAC claim in the district court.

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[3] Respondent's assertion that this issue is the subject of multiple circuit splits is inaccurate. Although several cases have held that only "actual constitutional errors" can be considered cumulatively, *Fisher* v. *Angelone*, 163 F.3d 835, 852 n.9 (4th Cir. 1998); *Jones* v. *Stotts*, 59 F.3d 143, 147 (10th Cir. 1995) (same), respondent cites no case rejecting the cumulation of allegations of deficient performance. The cases that respondent cites do not support its argument that courts are split as to whether IAC constitutes a single claim. Rather, the circuits at most disagree as to when allegations of deficient performance are barred or procedurally defaulted, an issue that does not necessarily depend on whether IAC constitutes one claim or multiple claims. *See infra* 20.

2. Respondent also exaggerates the "dramatic consequences" of treating IAC as a single claim. *See* Resp't Br. 38-39 (arguing that, under "petitioner's one-and-done theory of ineffectiveness," state habeas counsel's "cursory effort" at raising an IAC claim will "leave any future ineffectiveness claims barred from relitigation."). First, the procedural bar doctrine does not necessarily depend on whether IAC is considered as a single claim supported by multiple allegations or as multiple claims. *Compare Galloway*, 56 F.3d at 1242 (holding that IAC is one claim, but that raising "an ineffective assistance of counsel claim on direct appeal does not bar the assertion of a subsequent ineffectiveness claim, based on different grounds" on habeas corpus), *with Peoples*, 408 F.3d 844, 846-48 (holding that IAC is one claim and that new allegations on habeas corpus are barred by law-of-the-case doctrine). Second, respondent has identified no principle in *Edwards* v. *Carpenter*, 529 U.S. 446 (2000), *Martinez* v. *Ryan*, 132 S.Ct. 1309 (2012), or *Trevino* that would prevent a court from entertaining a substantial but procedurally barred IAC claim upon an adequate showing of "cause" and "prejudice" for the default. Indeed, *Trevino* held that habeas petitioners can raise an IAC claim in just this circumstance.

3. The Court should remand this case. Contrary to respondent's suggestion, Resp't Br. 6, 48-49, the Fifth Circuit did not address the merits of the rejected IAC argument. "*Before turning to the merits* of Jennings' argument," the Fifth Circuit sought *first* to "determine whether his claim is procedurally barred." J.A.65 (emphasis added). The court explicitly stated that it "must first rule on a petitioner's COA request *before* this court has jurisdiction to consider it." J.A.66 (emphasis added). The court denied the COA request and never addressed the merits. J.A.68. Be-

cause petitioner did not need to cross-appeal or obtain a COA, he was entitled to merits consideration of his alternative IAC argument. If petitioner did need a COA, the Fifth Circuit should have remanded to the district court to make that determination in the first instance pursuant to *Cardenas* v. *Thaler*, 651 F.3d 442, 448 (5th Cir. 2011). Pet'r Br. 34-36.[4]

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[4] The Court should decline respondent's invitation to decide the merits of petitioner's IAC argument in the first instance. Certiorari was not granted on this issue, and its initial resolution should be left to the Fifth Circuit. Further, while respondent asserts that "no jurist of reason could debate . . . petitioner's *Spisak* claim," Resp't Br. 43, in fact, no reasonable jurist could conclude that making a closing argument that counsel "can't quarrel with" a death sentence is a sound strategic decision. Indeed, respondent does not cite one case holding that a lawyer's attempt to "identify" with jurors by telling them that he would sympathize with their decision to sentence his client to death constitutes an objectively reasonable strategy—especially in a jurisdiction such as Texas, where a deadlocked jury results in a life sentence. Tex. Code Crim. Proc. Ann. art. 37.071, § 2(g) (West 2013).

CONCLUSION

This Court should reverse the judgment and remand to the Fifth Circuit.

Respectfully submitted,

JEFFREY T. GREEN
ERIKA L. MALEY
PAUL J. SAMPSON
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000
jgreen@sidley.com

RANDOLPH L. SCHAFFER, JR.
Counsel of Record
1301 McKinney, Ste. 3100
Houston, Texas 77010
(713) 951-9555
rschaffer@swbell.net

Counsel for Petitioner

September 11, 2014

AMICUS CURIAE BRIEF

No. 13-7211

IN THE

Supreme Court of the United States

ROBERT MITCHELL JENNINGS,

Petitioner,

vs.

WILLIAM STEPHENS, Director,
Texas Department of Criminal Justice,
Correctional Institutions Division,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF NEITHER PARTY

KENT S. SCHEIDEGGER
Criminal Justice Legal Fdn.
2131 L Street
Sacramento, CA 95816
(916) 446-0345
briefs@cjlf.org

Attorney for Amicus Curiae
Criminal Justice Legal Foundation

QUESTION PRESENTED

In this case, a habeas corpus petitioner made multiple allegations of ineffective assistance of counsel in the penalty phase of a capital case. The District Court rejected one, accepted others, and granted relief, and the state appealed.

The question presented is whether, in these circumstances, a notice of appeal by the petitioner and a certificate of appealability are required to bring the rejected allegation before the court of appeals?

TABLE OF CONTENTS

Question presented i

Table of authorities iv

Interest of *amicus curiae* 1

Summary of facts and case 2

Summary of argument 4

Argument 5

I. The State's appeal of a grant of habeas relief brings before the Court of Appeals only the Petitioner's granted claim of a violation of a constitutional right, not other claims denied by the District Court 6

A. The purpose of the certificate and specification requirements 7

B. Implementing AEDPA 10

II. Ineffective assistance of counsel is a single "claim" or "ground" as to each phase of the trial 16

A. Successive petition cases 17

B. The certificate standard 22

III. The District Court's disposition of Petitioner's closing argument point is so clearly correct that no remand is needed 24

Conclusion 25

TABLE OF AUTHORITIES

Cases

Babbitt v. Woodford, 177 F 3d 744 (CA9 1999) 20

Barefoot v. Estelle, 463 U. S. 880, 103 S. Ct. 3383, 77 L. Ed. 2d 1090 (1983) 22

Brannigan v. United States, 249 F 3d 584 (CA7 2001) 20, 21

Brecht v. Abrahamson, 507 U. S. 619, 113 S. Ct. 1710, 123 L. Ed. 2d 353 (1993) 7

Brown v. Allen, 344 U. S. 443, 73 S. Ct. 397, 97 L. Ed. 469 (1953) 8

California v. Acevedo, 500 U. S. 565, 111 S. Ct. 1982, 114 L. Ed. 2d 619 (1991) 15

Clay v. United States, 537 U. S. 522, 123 S. Ct. 1072, 155 L. Ed. 2d 88 (2003) 22

Coleman v. Thompson, 501 U. S. 722, 111 S. Ct. 2546, 115 L. Ed. 2d 640 (1991) 18

Cunningham v. Estelle, 536 F 2d 82 (CA5 1976) 19, 20, 23

Fretwell v. Norris, 133 F 3d 621 (CA8 1998) 12

Gonzalez v. Crosby, 545 U. S. 524, 125 S. Ct. 2641, 162 L. Ed. 2d 480 (2005) 17, 19

Gonzalez v. Thaler, 565 U. S. __, 132 S. Ct. 641, 181 L. Ed. 2d 619 (2012) 10, 16, 23

Gray v. Netherland, 518 U. S. 152, 116 S. Ct. 2074, 135 L. Ed. 2d 457 (1996) 21

In re Reno, 55 Cal. 4th 428, 146 Cal. Rptr. 3d 297, 283 P 3d 1181 (2012) 9, 14

Jones v. Barnes, 463 U. S. 745, 103 S. Ct. 3308, 77 L. Ed. 2d 987 (1983) 9

Knowles v. Mirzayance, 556 U. S. 111, 129 S. Ct. 1411, 173 L. Ed. 2d 251 (2009) 25

Lawhorn v. Allen, 519 F 3d 1272 (CA11 2008) 7

Manokey v. Waters, 390 F. 3d 767 (CA4 2004) 11

Martin v. District of Columbia Court of Appeals, 506 U. S. 1, 113 S. Ct. 397, 121 L. Ed. 2d 305 (1992) 13

McCleskey v. Zant, 499 U. S. 467, 111 S. Ct. 1454, 113 L. Ed. 2d 517 (1991) 17, 18

Medellin v. Dretke, 544 U. S. 660, 125 S. Ct. 2088, 161 L. Ed. 2d 982 (2005) 22

Molina v. Rison, 886 F 2d 1124 (CA9 1989) 18, 20

Peoples v. United States, 403 F 3d 844 (CA7 2005) 21

Reese v. Fairman, 801 F 2d 275 (CA7 1986) 9

Roman v. Abrams, 790 F 2d 244 (CA2 1986) 10

Sanders v. United States, 373 U. S. 1, 83 S. Ct. 1068, 10 L. Ed. 2d 148 (1963) 17, 18

Sawyer v. Whitley, 505 U. S. 333, 112 S. Ct. 2514, 120 L. Ed. 2d 269 (1992) 19

Scott v. Mitchell, 209 F 3d 854 (CA6 2000) 12

Slack v. McDaniel, 529 U. S. 473, 120 S. Ct. 1595, 146 L. Ed. 2d 542 (2000) 22

Smith v. Murray, 477 U. S. 527, 106 S. Ct. 2661, 91 L. Ed. 2d 434 (1986) 9

Sosa v. Alvarez-Machain, 542 U. S. 692, 124 S. Ct. 2739, 159 L. Ed. 2d 718 (2004) 22

Szabo v. Walls, 313 F 3d 392 (CA7 2002) 7, 11, 12

United States v. Allen, 157 F 3d 661 (CA9 1998) 20

United States v. American Railway Express Co., 265 U. S. 425, 44 S. Ct. 560, 68 L. Ed. 1087 (1924) 14

United States v. Hayman, 342 U. S. 205, 72 S. Ct. 263, 96 L. Ed. 232 (1952) 13

United States v. Raines, 362 U. S. 17, 80 S. Ct. 519, 4 L. Ed. 2d 524 (1960) 15

Vicaretti v. Henderson, 645 F 2d 100 (CA2 1980) 9

Wiley v. Epps, 625 F 3d 199 (CA5 2010) 7

Williams v Cain, 125 F 3d 269 (CA5 1997) 12

United States Statutes

18 U. S. C. § 3771 25

28 U. S. C. § 2244 13

28 U. S. C. former § 2244(b) (1994 ed.) 17

28 U. S. C. § 2253(c) 8, 10, 13, 14, 22

28 U. S. C. § 2254 13, 22

28 U. S. C. § 2255 13

Act of Mar. 10, 1908, ch. 76, 35 Stat. 40 8

State Statute

Tex. Code. Crim. Proc., Art. 11.071, § 4(a) 3

Rules of Court

Federal Rule of Appellate Procedure 38 13

Rule 9 of the Rules Governing Section 2254 Cases in the Federal District Courts, 28 U. S. C. foll. § 2254 (1994 ed.) 17

Federal Rule of Appellate Procedure 22 12, 14

Other Authorities

ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases 10.8, comment. (rev. ed. 2003), reprinted in 31 Hofstra L. Rev. 913 (2003) 9

Advisory Committee's Notes on Fed. Rule App. Proc. 22, 28 U. S. C. App. (2012 ed.) 12

Friendly, The Bill of Rights as a Code of Criminal Procedure, 53 Cal. L. Rev. 929 (1965) 8

Gressman, E., *et al.*, Supreme Court Practice (9th ed. 2007) 14

Moore, J., Federal Practice (3d ed. 2013) 6

Restriction of Right of Appeal in Habeas Corpus Proceedings, H. R. Rep. 23, 60th Cong., 1st Sess. (1908) 8

IN THE

Supreme Court of the United States

ROBERT MITCHELL JENNINGS,

Petitioner,

vs.

WILLIAM STEPHENS, Director,
Texas Department of Criminal Justice,
Correctional Institutions Division,

Respondent.

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF NEITHER PARTY

INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF)[1] is a non-profit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the constitutional protection of the accused into balance with the rights of the victim and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

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1. The parties have consented to the filing of this brief.

No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae* CJLF made a monetary contribution to its preparation or submission.

This case involves the procedure for what is often the fifth review of a capital case already reviewed four times by three different courts. Uncertainty and confusion regarding procedure at this late stage can result in unnecessary litigation over purely procedural matters, causing unnecessary delays in cases that are already badly delayed by the time they reach this stage. Resolution of these issues in a manner that provides clear guidance would serve the interests CJLF was formed to protect.

SUMMARY OF FACTS AND CASE

The Fifth Circuit summarized the facts of the case as presented at trial:

> "On July 19, 1988, Jennings shot and killed Elston Howard, an officer with the Houston Police Department. Officer Howard was in the process of arresting the clerk of an adult bookstore when Jennings entered the store, intending to commit a robbery Jennings shot Officer Howard four times in the back and head and then robbed the store clerk.
>
> "A jury convicted Jennings of capital murder. During the punishment phase, the State of Texas presented evidence of Jennings' lengthy criminal history. At the age of fourteen, Jennings was declared a delinquent and placed on probation. At seventeen, he was convicted of aggravated robbery and sentenced to five years' imprisonment. At twenty, he was convicted of two more aggravated robberies and a burglary and sentenced to concurrent thirty-year sentences. Within two months of his release, he committed six more aggravated robberies, including the one that resulted in Officer Howard's death.

> "George Burrell, the jail chaplain, was the only defense witness called during the punishment phase. Burrell testified that he met Jennings in the county jail shortly after Jennings' arrest for Officer Howard's murder. Burrell saw Jennings two to three times a week, and he testified that he did not believe Jennings was 'incorrigible.' No other mitigation evidence was presented." J. A. 42-43.

The Texas Court of Criminal Appeals affirmed on direct appeal in an unpublished opinion. *Jennings* v. *State*, No. 70,911 (Jan. 20, 1993). See App. to Pet. for Cert. 32. Under Texas procedure, the state habeas corpus petition is returnable in the Court of Criminal Appeals, see Tex. Code. Crim. Proc., Art. 11.071, § 4(a), but the trial court made findings of fact, conclusions of law, and a recommended disposition. See App. to Pet. for Cert. 42-60.

Petitioner's second ground for relief was on effectiveness of trial representation, making arguments regarding evidence of mental impairment, presentation of background evidence, failure to reopen voir dire, and closing argument. App. to Pet. for Cert. 43-54. The trial court found all without merit, along with Petitioner's other contentions, and recommended denial of the petition. App. to Pet. for Cert. 58. The Court of Criminal Appeals reviewed the order and found that the mitigating evidence allegation was sufficiently substantial to warrant further consideration, along with a claim under *Penry* v. *Lynaugh*, 492 U. S. 302 (1989). See App. to Pet. for Cert. 32. Following further review, the court denied relief. See App. to Pet. for Cert. 41.

On federal habeas corpus, the District Court found merit in the allegations regarding counsel's performance on mitigating evidence but not on closing argument and granted relief. J. A. 22-34.

Respondent appealed. See J. A. 36. The Court of Appeals found that the state court's rejection of the claims accepted by the District Court was reasonable under the deferential standard of 28 U. S. C. § 2254(d). See J. A. 49-60.

The Court of Appeals found that Petitioner's "cross-point" regarding trial counsel's closing argument was not properly before it because Petitioner did not file a timely notice of cross-appeal, did not seek a certificate of appealability from the District Court, and did not seek one from the Court of Appeals until six months after the Respondent's appeal. See J. A. 65-68. The Court of Appeals noted a division of authority in the federal courts of appeals on whether a certificate of appealability is required when the state appeals a grant of habeas relief and petitioner seeks review of a ground not accepted. See *ibid*. On March 24, 2014, this Court granted certiorari limited to this issue.

SUMMARY OF ARGUMENT

Appeals in cases of collateral attacks by prisoners on criminal judgments are different from other appeals. Congress has repeatedly seen fit to impose additional restrictions due to a flood of meritless contentions by persons with nothing to lose. For this reason, the standard rule for civil cases that an appellee can assert other grounds for the same relief without a cross-appeal should not be blindly extended to collateral review cases. In order to implement the certificate of appealability requirement imposed by Congress according to its purpose and intent, a cross-appeal supported by a certificate of appealability should be required to place before the merits panel on appeal any claim for relief rejected by the District Court.

Ineffective assistance of counsel is a single claim or ground for relief as to each phase of the trial. It was so understood in long-established case law before AEDPA regarding the successive petition rule. Creating a new category of "specific issue" for the purpose of appeals would create uncertainty and confusion, and the resulting delays would be contrary to the purpose of the statute.

The one issue that the Fifth Circuit erroneously failed to consider on the merits in this case is so patently without merit that the procedural error is harmless, and remand is unnecessary. Unnecessary delay is unreasonable delay, in violation of the rights of victims of crime under 18 U. S. C. § 3771.

ARGUMENT

The question in this case is whether a Federal District Court's grant of habeas corpus relief as to sentence on the ground of ineffective assistance of counsel in the penalty phase of a capital case, with an appeal of that ruling by the State, brings before the Court of Appeals particular allegations of ineffectiveness made by the petitioner but rejected by the District Court, or whether a certificate of appealability and cross-appeal is necessary to bring those additional allegations before the appellate court. There are two parts to this question.

First, is a certificate of appealability and cross-appeal necessary at all when the habeas petitioner seeks to argue on appeal claims rejected by the District Court but not seeking to expand the scope of relief beyond that granted by the District Court? Stated another way, does the grant of habeas relief by the District Court (1) open the floodgates to any and all claims seeking the same relief, even those obviously without

merit, or (2) give the Court of Appeals jurisdiction over only that claim, the same as if the District Court had denied the claim but granted a certificate of appealability on it?

For the reasons stated in Part I of this brief, *amicus* CJLF believes that the answer is (2). This raises the additional question of the scope of a "claim." For the reasons stated in Part II of this brief, *infra*, *amicus* CJLF submits that ineffective assistance of counsel in the penalty phase is a single claim, within the jurisdiction of the Court of Appeals in its entirety.

Given that the Court of Appeals held that the petitioner's "closing argument" point was not before it, the final question is what remedy this Court should grant. Although the usual procedure is to leave such questions to be decided on remand, this case calls for a different disposition. The omitted point is so patently meritless that leaving it open for decision on remand would cause a needless further delay in justice that is already long overdue. The additional point adds so little to the argument already rejected that the judgment of the Court of Appeals is clearly correct, and it should be affirmed.

I. The State's appeal of a grant of habeas relief brings before the Court of Appeals only the Petitioner's granted claim of a violation of a constitutional right, not other claims denied by the District Court.

"[A] habeas corpus petitioner to whom the writ has been granted may not assert, in opposition to an appeal by the state, any ground that the district court has not adopted, unless the petitioner obtains a certificate of appealability permitting him or her to argue that ground." 20A J. Moore, Federal Practice § 322.12[2][a],

pp. 322-10 & 322-11 (3d ed. 2013) (citing *Jones* v. *Keene*, 329 F 3d 290, 296-297 (CA2 2003); *Manokey* v. *Waters*, 390 F 3d 767, 773-774 (CA4 2004); *Rios* v. *Garcia*, 390 F. 3d 1082, 1087-1088 (CA9 2004)); see also *Wiley* v. *Epps*, 625 F 3d 199, 204, n. 2 (CA5 2010); *Lawhorn* v. *Allen*, 519 F 3d 1272, 1285, n. 20 (CA11 2008).

In his petition for certiorari, Petitioner did not challenge the correctness of the rule as stated in *Wiley* but instead expressly stated that the rule "*should* apply where a petitioner raises multiple grounds for relief; the district court grants relief on fewer than all of the grounds; the respondent appeals; and the petitioner seeks review of the grounds on which relief was denied." Pet. for Cert. 38 (emphasis added). His argument was that the rule should not apply to separate allegations of ineffective assistance of counsel, which he contends is a single "claim" or "ground." See *ibid.* In Part I of his brief on the merits, though, Petitioner rejects his own prior position and asks this Court to adopt the outlier view of the Seventh Circuit in *Szabo* v. *Walls*, 313 F 3d 392 (2002). *Amicus* submits that Petitioner had it right the first time.

A. The Purpose of the Certificate and Specification Requirements.

The long-standing challenge in the law of habeas corpus as a mechanism of collateral review has been to find the correct balance between keeping the remedy available " 'to guard against extreme malfunctions in the state criminal justice systems,' " *Brecht* v. *Abrahamson*, 507 U. S. 619, 634 (1993) (quoting *Jackson* v. *Virginia*, 443 U. S. 307, 332, n. 5 (1979) (Stevens, J., concurring in the judgment), and protecting properly operating justice systems from being bogged down and obstructed by "floods of stale, frivolous and repetitious

petitions [that] inundate the docket of the lower courts and swell [this Court's] own." *Brown* v. *Allen*, 344 U. S. 443, 536 (1953) (Jackson, J., concurring in the judgment). This case deals with one aspect of that challenge.

Congress's attempts to deal with the specific problem of excessive appeals date back over a century. In 1908, the House Judiciary Committee reported out a bill with the purpose "to correct a very vicious practice of delaying the execution of criminals by groundless habeas corpus proceedings and appeals therein taken just before the day set for execution " Restriction of Right of Appeal in Habeas Corpus Proceedings, H. R. Rep. 23, 60th Cong., 1st Sess., 1 (1908). "The prosecution of an appeal under these circumstances results in a delay of anything like a year or two years. The appeals are prosecuted without reference to the question as to whether there is any merit to the appeal " *Ibid.* The Committee's solution was that "no appeal can be prosecuted unless either the United States court making the final decision or a justice of the Supreme Court shall be of the opinion that there exists probable cause for such appeal." *Id.*, at 2; Act of Mar. 10, 1908, ch. 76, 35 Stat. 40. This act is the ancestor of 28 U. S. C. § 2253(c).[2] Its purpose, clear and simple, was to eliminate the delay caused by clearly meritless appeals, particularly in capital cases.

The vast expansion of the issues deemed to be federal constitutional issues during the Warren Court era, see generally Friendly, The Bill of Rights as a Code of Criminal Procedure, 53 Cal. L. Rev. 929 (1965), brought an additional problem. Along with the large number of habeas petitions and appeals from them,

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2. All further section references are to title 28 of the United States Code unless otherwise indicated.

there arose a problem of petitions and appeals containing a large number of issues, most obviously without merit. This problem was compounded in capital cases, where the defense bar developed a "throw everything against the wall and see if any of it sticks" mentality, despite long-settled wisdom that such tactics are bad advocacy. Compare *Jones* v. *Barnes*, 463 U. S. 745, 751-752 (1983) (winnowing is hallmark of effective advocacy) and *Smith* v. *Murray*, 477 U. S. 527, 536 (1986) (same, capital case), with ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases 10.8, comment. (rev. ed. 2003), reprinted in 31 Hofstra L. Rev. 913, 1030 (2003) (all conceivable claims). More recently, in *In re Reno*, 55 Cal. 4th 428, 443, 283 P 3d 1181, 1195 (2012), the California Supreme Court was presented with a petition that exemplified abusive practices. It was "well over 500 pages long and by its own count raise[d] 143 separate claims."

Long before the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), some federal courts had begun to address the problem of excessive issues as distinguished from excessive appeals by "limiting the grounds of an appeal to one or more specified issues when issuing a certificate of probable cause to permit appeal from denial of a state prisoner's petition for habeas corpus." *Vicaretti* v. *Henderson*, 645 F 2d 100, 101 (CA2 1980). The Second Circuit in *Vicaretti* upheld the practice, making an analogy to this Court's practice of limiting a writ of certiorari to particular issues and noting that "both practices involve a court's sensible attempt to focus the attention of the litigants on the issues that merit review under the relevant standard." *Id.*, at 102. However, the circuits were split on whether certificates could be so limited under the pre-AEDPA version of § 2253. See *Reese* v. *Fairman*, 801 F. 2d 275, 276 (CA7 1986).

In *Roman* v. *Abrams*, 790 F 2d 244 (1986) (*per curiam*), the Second Circuit held that the rationale of *Vicaretti* further required a certificate of probable cause when a habeas petitioner prevails on one claim and seeks review of claims that were denied.

> "Precisely the same considerations apply when, after the writ of habeas corpus has been granted on one ground, the petitioner seeks to cross-appeal from the dismissal of other grounds asserted in the district court. Requiring a certificate of probable cause in those circumstances also focuses the attention of litigants and the court on potentially meritorious issues, while avoiding the waste of judicial resources in a futile review of clearly meritless claims." *Id.*, at 245.

B. Implementing AEDPA.

In AEDPA, Congress did more than take the *Vicaretti* side of the circuit split. It went considerably further. Congress made the previously discretionary procedure mandatory in every habeas corpus appeal. See § 2253(c)(3). Although not jurisdictional, the language is unmistakably mandatory. See *Gonzalez* v. *Thaler*, 565 U. S. __, 132 S. Ct. 641, 651, 181 L. Ed. 2d 619, 633-634 (2012). The overarching purpose of the habeas reforms of AEDPA is the same as it was when Congress first imposed the certificate requirement 88 years earlier—to reduce delay. See *id.*, 132 S. Ct., at 650, 181 L. Ed. 2d, at 632-633. "The COA [certificate of appealability] process screens out issues unworthy of judicial time and attention and ensures that frivolous claims are not assigned to merits panels." *Id.*, 132 S. Ct., at 650, 181 L. Ed. 2d, at 633. Given the purpose of the requirement, this screening is every bit as necessary when the petitioner has prevailed on one

claim out of many as it is when one claim out of many is found to be substantial but short of requiring relief.

To illustrate, let us suppose that two death-sentenced state prisoners, A and B, file petitions like the one in *In re Reno*, *supra*. Both are over 500 pages and have 143 claims each. Now let us vary the facts slightly and say that in both petitions, 142 claims are so clearly meritless as to not warrant a COA but one claim is a close call. It involves a subjective judgment of materiality for a nondisclosure issue or prejudice for an ineffective assistance issue, and the decision as to whether it is just barely meritorious or just barely short of that level may depend on which judge is assigned to the case. Let us say that A is granted relief, and the state appeals; B is denied relief, but the district judge issues a COA limited to that claim. Either way the close claim is before the Court of Appeals for briefing, argument, and decision.

What about the other 142 claims, all meritless beyond the limits of reasonable disagreement? Should these 142 claims be properly before the Court of Appeals in A's case but in not B's? That would be the result if the outlier rule of *Szabo* v. *Walls* 313 F. 3d 392, 397-398 (CA7 2002) is adopted. That is a wrong result, contrary to the purpose of AEDPA.

Szabo simply notes the rule in civil cases regarding additional arguments by an appellee not asking for additional relief and sees no reason for habeas corpus cases to be different. See 313 F 3d, at 397. "Federal habeas, however, *is* different." *Manokey* v. *Waters*, 390 F 3d 767, 773 (CA4 2004) (emphasis added). The *Szabo* court appears to have received inadequate briefing of the issue. The statement that "no court has demanded that a prisoner obtain a certificate of appealability in order to present an extra issue in a case already before the court on the state's appeal," 313

F 3d, at 397-398, is mistaken and badly so. As noted above, there was already a history in the Second Circuit of exactly such a requirement before AEDPA, and the Eighth Circuit had upheld this requirement in *Fretwell* v. *Norris*, 133 F 3d 621, 623 (1998), after AEDPA and four years before *Szabo*. There are also indications of such a practice in other circuits post-AEDPA, with certificates being granted and cross-appeals being filed. See *Scott* v. *Mitchell*, 209 F. 3d 854, 862-863 (CA6 2000); *Williams* v. *Cain*, 125 F. 3d 269, 273 (CA5 1997).

Szabo says "we are content to apply § 2253 as it is written," 313 F 3d, at 398, but before AEDPA that section already had a long history of being applied to effectuate its purpose rather according to a strict parsing of its words. Taken literally, § 2253 from the beginning would have required a certificate of probable cause when the state appealed. This literal interpretation was rejected by four of the five circuits to consider it, and when this Court adopted the Federal Rules of Appellate Procedure in 1967, Rule 22 expressly negated the requirement when the state appeals. See Advisory Committee's Notes on Fed. Rule App. Proc. 22, 28 U. S. C. App., p. 689 (2012 ed.); see also *id.*, at 690 (text of pre-1996 Rule 22). By the time of AEDPA, this usage was so well established that Congress did not bother "fixing" § 2253(c)(1) in this regard, even while amending the certificate requirement substantially in other ways.

Petitioner's argument consists largely of claiming that the certificate and cross-appeal requirements ought not apply to petitioners collaterally attacking convictions when they do not apply to other parties and other types of cases. As most of the courts to consider the matter have recognized, however, the requirement should apply to the cases and parties presenting the problem to which it is addressed and not to others.

Petitioner notes that civil litigants can argue alternate grounds for the relief granted by the District Court without a cross-appeal. See Brief for Petitioner 8-13. Civil litigants are not similarly situated with prisoners attacking their convictions. Most civil litigants are represented by counsel, paid either with fees or a contingent share of the relief. The waste of the client's money or the attorney's time serves as a partial check against the kind of abusive, frivolous filings that motivated Congress to impose limits in collateral review cases in 1908 and again in 1996. The check is not 100% effective, of course, and frivolous appeals are taken, but not in the same degree. Additionally, other measures are available to deal with frivolous appeals in civil cases. See, *e.g.*, Fed. Rule App. Proc. 38 (monetary sanctions); *Martin* v. *District of Columbia Court of Appeals*, 506 U. S. 1 (1992) (forbidding further *in forma pauperis* applications in noncriminal matters).

Petitioner contends that "[h]abeas cases are no exception" to the rule that a cross-appeal is unnecessary to argue an alternate ground for the same relief. See Brief for Petitioner 14. However, "habeas cases" and collateral attacks on convictions are not the same set of cases, though they very largely overlap. The problem noted at the beginning of this part, see *supra*, at 7, exists for habeas corpus when used as a means of collateral attack on final criminal judgments, and that is where Congress has directed its restrictions. See §§ 2244, 2254. It also exists for federal prisoners making motions under § 2255, which are not habeas corpus proceedings. See *United States* v. *Hayman*, 342 U. S. 205, 212-219 (1952) (history and purpose of § 2255). Accordingly, Congress has restricted appeals not in habeas cases generally or exclusively, but in the cases of habeas corpus petitions by persons in custody by virtue of orders of state courts, § 2253(c)(1)(A) and federal prisoner motions seeking relief from criminal

judgments. § 2253(c)(1)(B). Tellingly, Petitioner does not rely on a habeas case collaterally attacking a criminal judgment but instead on a deportation case. See Brief for Petitioner 14 (citing *Drax* v. *Reno*, 338 F 3d 98 (CA2 2003)). That case is inapposite.

Also inapposite are cases where the state argues an alternate ground on appeal without taking a cross-appeal. See Brief for Petitioner 14 (citing *Neverson* v. *Farquharson*, 366 F 3d 32 (CA1 2004)). As noted above, § 2253's restriction on appeals was widely held inapplicable to appeals by the state before there was textual support for an exception. Flooding the appellate courts with a host of patently meritless claims in appeals by the state has not been seen as a problem to date. *Amicus* is unaware of a single case where a court has been subjected to a pleading by a state with over 100 contentions, all meritless, but such abuse is common in prisoners' pleadings in capital cases. See, *e.g.*, *In re Reno*, 55 Cal. 4th, at 442-443, 283 P 3d, at 1195. Petitioner contends "[i]t would plainly be inequitable to apply a different cross-appeal rule to a habeas petitioner than to a warden," Brief for Petitioner 14, but that asymmetry is exactly what Rule 22 and the long-standing interpretation of § 2253(c)(1) do with the certificate requirement. There is no inequity in applying different rules to persons who are not similarly situated. If symmetry is required, though, the purpose of the statute would be better served by requiring cross-appeals on both sides rather than neither side.

The rule that Petitioner relies on is a "general rule," not a hard and fast one, in this Court on certiorari as well as in regular appeals. See E. Gressman, *et al.*, Supreme Court Practice 489 (9th ed. 2007). Respondents are sometimes denied consideration of additional arguments for affirmance due to failure to cross-petition even when a straightforward application of *United*

States v. *American Railway Express Co.*, 265 U. S. 425 (1924), would allow the issue to be considered. The rule is one of policy, not statutory mandate, and the policy considerations need to be weighed anew for each type of review proceeding.

For example, in *California* v. *Acevedo*, 500 U. S. 565, 568 (1991), the state appellate court granted the remedy of suppression of evidence after finding that police officers had probable cause to believe a paper bag in Acevedo's car had marijuana and legally seized it but could not open the bag without a warrant. On the state's petition for certiorari, this Court reviewed the warrant question but "decline[d] to second-guess the California courts" on probable cause, noting that Acevedo did not cross-petition on that question. See *id.*, at 573, n. 2. Acevedo was not asking for any expansion of the relief granted by the lower court. A finding of no probable cause would produce the same result, suppression of the evidence. Yet this Court declined to consider the argument. The pre-AEDPA rationale for limiting issues in habeas appeals was based in part on an analogy to this Court's practice of limiting issues on certiorari. See *supra*, at 9.

United States v. *Raines*, 362 U. S. 17 (1960), provides an informative contrast. The *Raines* Court allowed the prevailing party in the District Court to raise additional arguments against the constitutionality of the statute that the District Court had rejected, even though a cross-appeal had not been properly docketed. See *id.*, at 27, n. 7. However, the Court did not simply rely on the general rule but instead examined the policy of the special statute for the type of appeal in question, finding it "indicate[d] a desire of Congress that the whole case come up" and contrasting it with another statute providing a much more limited appeal. See *ibid.* The present case deals with a statute providing a type

of appeal that Congress has repeatedly found a need to limit, just the opposite of *Raines*.

In its most recent opinion on § 2253, this Court interpreted the statute in a way to avoid "thwart[ing] Congress' intent in AEDPA 'to eliminate delays in the federal habeas review process.'" *Gonzalez* v. *Thaler*, 565 U. S. __, 132 S. Ct. 641, 650, 181 L. Ed. 2d 619, 632-633 (2012) (quoting *Holland* v. *Florida*, 560 U. S. 631, 648 (2010)). That same consideration calls for applying a requirement of cross-appeal, authorized with a certificate of appealability, in this situation. Without it, the floodgates are open to unlimited appellate review of meritless claims, exactly what Congress sought to avoid, whenever a single claim is deemed meritorious in the District Court.

II. Ineffective assistance of counsel is a single "claim" or "ground" as to each phase of the trial.

At the certiorari petition stage of the present case, Petitioner argued:

> "The rule [requiring a separate notice of appeal and motion for a certificate of appealability (COA)] should not apply where the petitioner raises one ground of IAC [ineffective assistance of counsel]; the district court grants relief based on one or more allegations of deficient performance but rejects another allegation; the respondent appeals; and the petitioner seeks review of the rejected allegation of deficient performance." Pet. for Cert. 38.

In his merits brief, Petitioner argues that no COA was necessary because "Petitioner did not raise a separate claim on appeal that would have provided greater relief, but merely made an additional argument in support of

the single claim that he prevailed upon in the district court." Brief for Petitioner 26.

For the reasons stated below, *amicus* CJLF believes this is correct. The terms "claim" and "ground" are interchangeable in habeas corpus, the COA specification requirement applies to claims, and ineffective assistance in the penalty phase is one claim.

A. Successive Petition Cases.

The largest body of pre-AEDPA caselaw on the scope of a claim is found in the successive petition context. The pre-AEDPA habeas statute and rules used the term "ground" instead of "claim." See 28 U. S. C. former § 2244(b) (1994 ed.); Rule 9 of the Rules Governing Section 2254 Cases in the Federal District Courts, 28 U. S. C. foll. § 2254 (1994 ed.). However, the word "claim" was used interchangeably with "ground" by this Court in its thorough examination of the abuse-of-the-writ doctrine in *McCleskey* v. *Zant*, 499 U. S. 467, 479-489 (1991), and the Court has continued to use them interchangeably post-AEDPA. See *Gonzalez* v. *Crosby*, 545 U. S. 524, 532 (2005). Congress's change from "ground" to "claim" is therefore probably an updating of language rather than a substantive change.

Sanders v. *United States*, 373 U. S. 1, 16 (1963), has a brief discussion of what a "ground" is.

> "By 'ground,' we mean simply a sufficient legal basis for granting the relief sought by the applicant. For example, the contention that an involuntary confession was admitted in evidence against him is a distinct ground for federal collateral relief. But a claim of involuntary confession predicated on alleged psychological coercion does not raise a different 'ground' than does one predicated on

alleged physical coercion. In other words, identical grounds may often be proved by different factual allegations."

Sanders must be considered with caution, because it was part of a series of habeas decisions that this Court subsequently abandoned as giving too little weight to the State's interest in finality. See *McCleskey*, 499 U. S., at 506 (Marshall, J., dissenting) ("repudiates a line of judicial decisions "); *Coleman* v. *Thompson*, 501 U. S. 722, 750 (1991) (overruling *Fay* v. *Noia*, 372 U. S. 391 (1963), for giving insufficient weight to finality). Immediately after the passage quoted above, *Sanders* makes the unsupported comment, "Should doubts arise in particular cases as to whether two grounds are different or the same, they should be resolved in favor of the applicant." *Sanders*, 373 U. S., at 16. That is precisely the kind of tilt in the petitioner's favor that this Court found unjustified in *Coleman*, and this statement should not be considered authoritative. For its illustration of "ground," however, *Sanders* is consistent with subsequent cases.

In the interval between *Sanders* and *McCleskey*, there was a significant difference between a second petition presenting a new "ground" and one that reasserted a previous ground with new support. *Molina* v. *Rison*, 886 F 2d 1124, 1128-1129 (CA9 1989), has a useful survey of court of appeals cases on the meaning of "ground" in this interval.

Molina's survey concludes that "despite the similarity or differences in the factual context of the claim, a ground is successive [the same ground, as opposed to a new one] if the basic thrust or 'gravamen' of the legal claim is the same " The focus is on the federal constitutional right of the defendant alleged to have been violated and not on the particular facts proffered to support that claim. The cases unequivocally reject

arguments tied to the particular supporting facts. *Cunningham* v. *Estelle*, 536 F. 2d 82, 83 (CA5 1976) (*per curiam*), specifically addressed ineffectiveness claims, holding that an ineffective assistance claim "simply varying the factors that he claims demonstrate incompetency" was the same ground as the prior claim.

From *McCleskey* to AEDPA, there was little discussion of what was an old ground and what was a new one, because the same exceptions applied to both "successive and abusive claims," as they were known. For example, *Sawyer* v. *Whitley*, 505 U. S. 333, 348-349 (1992), explored the "miscarriage of justice" exception but never specified which category Sawyer's claims fell in, because it did not matter. After AEDPA, the issue has not been extensively litigated because the distinction rarely changes the result in § 2244(b) cases. While paragraph (1) has no exceptions at all, paragraph (2) has exceptions so tight that very few petitioners have even a colorable claim to meet them. Even so, the distinction is there, and the first step in a § 2244 analysis is to identify which paragraph governs, *i.e.*, whether the "claim" is the same or a new one. See *Gonzalez* v. *Crosby*, 545 U. S. 524, 530 (2005).

Gonzalez defined "claim" as "an asserted federal basis for relief." *Ibid.* This definition tracks *Sanders*' "sufficient legal basis for granting the relief sought" language, which was understood in the cases collected in *Molina* to be inconsistent with an approach that ties claims to the specific facts offered to support them. *Gonzalez* did not, and did not need to, definitively answer whether "a new factual predicate" could make a new claim, see *id.*, at 531, because the main issue in the case was claims versus nonclaims, not new claims versus old claims. The "even assuming" language of

this passage seems to express serious doubt of that proposition but reserves resolution for a future case.

Only a few post-AEDPA successive petition cases in the courts of appeals have addressed the definition of a "claim" in distinguishing new claims from repeated claims. Those few have understood "claim" in a broader sense than the Court of Appeals did in the present case. *United States* v. *Allen*, 157 F 3d 661 (CA9 1998), was a second § 2255 petition by a federal prisoner. Allen repeated the allegations of attorney ineffectiveness from the first petition and added significant new ones. See *id.*, at 664. The court held this to be the same ground, applying the "thrust or gravamen" approach of *Molina*, *supra*, and following *Cunningham* v. *Estelle*, *supra*. *Ibid.*

Babbitt v. *Woodford*, 177 F 3d 744 (CA9 1999) (*per curiam*), involved a motion to file a second federal petition by a state prisoner. In the first petition, he had alleged ineffective assistance based on failure to present Post-Traumatic Stress Disorder (PTSD) evidence but now he had newly discovered evidence of trial counsel's alcohol abuse. *Id.*, at 746. Notwithstanding the completely different factual basis, the court held it was the same claim, following *Allen*, and dismissed under § 2244(b)(1). *Ibid.*

The Seventh Circuit has reached a similar conclusion, at least with regard to ineffective assistance claims. In *Brannigan* v. *United States*, 249 F 3d 584, 587-588 (CA7 2001), the court noted that it was tempting to borrow the answer from civil claim-preclusion law but concluded that could not be right, because then every collateral attack on a criminal judgment would only have one "claim" and all successive claims would be precluded. *Id.*, at 587. *Brannigan* goes on to conclude that all challenges to a single step in the case are one claim regardless of legal theory, *id.*, at 588, but that

conclusion cannot be squared with a long line of authority from *Sanders* to *Gray* v. *Netherland*, 518 U. S. 152, 162-165 (1996). However, *Brannigan* is consistent with *Babbitt* that ineffective assistance is a single claim, although the statement is arguably dictum because *Brannigan* was not an ineffective assistance case. 249 F. 3d, at 589.

A second opinion of the Seventh Circuit, also by Judge Easterbrook, directly addressed a successive ineffective assistance claim. In *Peoples* v. *United States*, 403 F 3d 844, 846 (CA7 2005), the petitioner had been before the court three times, and each time he had alleged ineffective assistance of counsel. The first two times the Seventh Circuit resolved the claim on the merits, and "that is enough (if not once more than enough), and we decline to revisit the subject." *Ibid.*

> "Peoples presented ineffective-assistance arguments in his two prior appeals. That ground was resolved adversely to him on the merits, twice. Although Peoples now wants to present new instances of supposed shortcomings, ineffective assistance of counsel is a single ground for relief no matter how many failings the lawyer may have displayed. Counsel's work must be assessed as a whole; it is the overall deficient performance, rather than a specific failing, that constitutes the ground of relief." *Id.*, at 847-848 (citing *Bell* v. *Cone*, 535 U. S. 685, 697 (2002), and *Strickland* v. *Washington*, 466 U. S. 668, 690 (1984)).

If "ineffective assistance of counsel is a single ground for relief" for other purposes in the law of habeas corpus, should "instances of supposed shortcomings" nonetheless be broken up for the purpose of certificates of appealability? This is the ultimate issue in this case.

B. The Certificate Standard.

Barefoot v. *Estelle*, 463 U. S. 880 (1983), established the standard for issuing a certificate of probable cause under the pre-AEDPA version of § 2253 as "a 'substantial showing of the denial of [a] federal right.'" *Id.*, at 893 (quoting *Stewart* v. *Beto*, 454 F 2d 268, 270, n. 2 (CA5 1971)). The standard was not really new in 1983, as the quotation from a 1971 case indicates, but rather reflected "the weight of opinion in the Courts of Appeals." *Ibid.* Given that the denial of federal right is the only ground for federal habeas corpus relief for a prisoner in custody pursuant to a judgment of a state court, see § 2254(a), the *Barefoot* standard was essentially congruent with a substantial showing of a ground for relief.

In AEDPA, Congress largely codified the *Barefoot* standard in § 2253(c)(2), although it changed "federal right" to "constitutional right." See *Slack* v. *McDaniel*, 529 U. S. 473, 483 (2000); *Medellin* v. *Dretke*, 544 U. S. 660, 666 (2005) (*per curiam*) (treaty claim). The present case involves only constitutional claims, so that wrinkle need not be addressed here.

Looking to the text, we see that Congress used the term "specific issue" in § 2253(c)(3). An argument could certainly be made that by using this term instead of the prior term "ground" or its equivalent "claim" Congress presumably meant something different. See *Sosa* v. *Alvarez-Machain*, 542 U. S. 692, 711, n. 9 (2004); but see *Clay* v. *United States*, 537 U. S. 522, 528-529 (2003) (rejecting an argument based on wording variation). In this case, though, it is difficult to formulate what that "something different" might be. There is no pre-AEDPA line of cases using the term "specific issue" to mean something different from and more focused than "claim" or "ground."

Creating a new category with uncertain boundaries would inject more complexity and uncertainty into an area of law that is already far too complex. The purpose of the COA requirement is to streamline the process for the purpose of reducing delay. See *Gonzalez* v. *Thaler*, 132 S. Ct., at 650, 181 L. Ed. 2d, at 632-633. Uncertainty over the meaning of a new category of "issues" would cause delays as the meaning is hashed out and decisions are reversed, delay that could have been avoided if the well-established meaning of "ground" or "claim" had been used. The present case is an example. If the Fifth Circuit had understood that a cross-appeal and certificate of availability are not needed for additional arguments on the same "ground," defined the same as for the successive petition rule, its own precedent in *Cunningham* v. *Estelle*, *supra*, would have told it that ineffective assistance was one ground. It could have easily disposed of Jennings' flimsy closing argument point on the merits in July 2013, and this case would not have suffered the additional delay it has been subject to.

The straightforward answer to the problem is that "specific issue" in § 2253(c)(3) means the same thing as "claim" in § 2244(b) and "ground" in the pre-AEDPA version of the latter section. Ineffective assistance of counsel is one "claim," at least as to each phase of the trial.[3]

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3. As Petitioner notes, claims in the guilt and penalty phases must be deemed separate claims, as different remedies would be required for each. See Brief for Petitioner 33, n. 5. This logic is not limited to ineffective assistance claims.

III. The District Court's disposition of Petitioner's closing argument point is so clearly correct that no remand is needed.

Normally, a procedural error such as the one made by the Fifth Circuit in this case would result in a remand with directions to apply the law as stated in this Court's opinion. In this case, however, the Court must consider whether to make an exception from that usual practice in light of countervailing considerations and the patent meritlessness of the Petitioner's argument.

The District Court rejected the Petitioner's point on trial counsel's closing argument as follows:

> "In his closing argument at the penalty phase, counsel stated that 'I can't quarrel with' a decision to sentence Jennings to death because counsel, like the jurors, lived and worked in Harris County and cared about having a safe community. He nonetheless asked the jurors to give sufficient weight to the mitigating evidence to return a life sentence. 39 Tr. [at] 239-40. Jennings now argues that this was ineffective.
>
> "Counsel was trying to convince the jury to decline to impose a death sentence on a man who they found murdered a police officer. The penalty phase evidence showed that Jennings had a long and violent criminal history. There was virtually no mitigating evidence. It is clear from the record that counsel was trying to identify with the jurors, and to convince them that he was a reasonable man who shared their interest in a safe community. In that posture, he argued that they should still impose a life sentence. In light of the extremely weak mitigation case, the state habeas court's conclusion that

this was a plausible strategy was not unreasonable." App. to Pet. for Cert. 25.

In light of the "doubly deferential judicial review that applies to a *Strickland* claim evaluated under the § 2254(d)(1) standard," *Knowles* v. *Mirzayance*, 556 U. S. 111, 123 (2009), this holding is so clearly correct that the Fifth Circuit's procedural hiccup is harmless beyond any doubt.

A factor that should always be considered in habeas cases, but regrettably rarely is, is the mandate from Congress regarding victims' rights. Victims of crime have a right to proceedings free from unreasonable delay. See 18 U. S. C. § 3771(a)(7). This right extends to habeas corpus proceedings. See *id.*, subd. (b)(2)(A). It extends to the families of homicide victims. See *id.*, subd. (e). The present case has been delayed too long already. A remand for the Court of Appeals to merely state the obvious would be an unreasonable delay, contrary to the statute.

CONCLUSION

The decision of the Court of Appeals for the Fifth Circuit should be affirmed.

June, 2014

Respectfully submitted,

KENT S. SCHEIDEGGER
Attorney for Amicus Curiae
Criminal Justice Legal Foundation